Firestone for FIRESTONE

Bridgestone/Firestone North American Tire, LLC, by the
[Respondent]
duly authorized representative named, titled and signed below, hereby consents to this Administrative Order on Consent and agrees to be bound by the terms and conditions thereof.

BY: _____

TITLE: Jane Moore, Senior Environmental Consultant

DATED: 4/28/04

Mailing name and address for this Respondent, or for his, her or its agent for service of process:

NAME: Heidi Bumpers

TITLE: Counsel, Jones Day

ADDRESS: 51 Louisiana Avenue, N.W.
Washington, D.C. 20001

OPTIONAL ENCLOSURES- Please check the appropriate box if you are filing either of the following optional applications:

☐ Application for financial review to qualify for reduced payment (see note on following page)

☒ Application for volume review (see note on following page)

If you submit this signature page on time, and do not file either optional application above, your settlement payment will automatically be reduced by 5%. However, if you submit this signature page on time with a completed application for volume review, and EPA approves your application, your settlement payment will also be reduced by 5%.

CERTIFICATION

I hereby certify, under threat of penalty for having made false statements to the United States Government, that the foregoing representations in this Application for Volume Review are true and correct to the best of my information and belief.

Dated: April 29, 2004

(Signature)

Heidi H. Bumpers

(Printed Name)

Jones Day

(Title)

Counsel

(Relationship to company or organization)

Application Form for Volume Review

If your company or organization wishes to request a volume review, it must complete this form in accordance with the instructions and submit it, **accompanied by your company or organization's executed settlement signature page**, in time for it to be received by the U.S. EPA at the address noted in the offer letter no later than 5:00 p.m. on **Friday, May 7, 2004**.

Company Name:	**Bridgestone/Firestone North American Tire, LLC**
Contact Name:	**Heidi Bumpers**
Contact Title:	**Counsel, Jones Day**
Street Address:	**51 Louisiana Avenue, N.W.**
City, State & Zip:	**Washington, D.C. 20001-2113**
Telephone Number:	**(202) 879-7616**
Fax Number:	**(202) 626-1700**
E-Mail Address:	**hhbumpers@jonsday.com**

Error Types. Please check every error type that is applicable to any manifest you would like the U.S. EPA to review. Please list each manifest you submit for review on the Manifest Review List, using the letter code(s) adjacent to the applicable error type description in the column on the Manifest Review List labeled "Error Type(s)."

☐ **A** Data Input Error. The total calculated quantity on one or more manifest(s) do(es) not match the data on the Manifest Summary. Please describe the problem for each affected manifest, enter the letter code "A" in the Error Type(s) column, and attach a copy of each manifest.

☒ **B** Generator Identification Error. One or more manifest(s) was or were attributed to the wrong generator (i.e., it does not belong to your company or organization). Please describe the problem for each affected manifest, enter the letter code "B" in the Error Type(s) column, and attach a copy of each manifest.

☐ **C** Other Error. The volume assigned to one or more manifest(s) is in error for a reason not covered in one of the above categories. Please describe the problem for each affected manifest , enter the letter code "C" in the Error Type(s) column, attach supporting documentation, and attach a copy of each manifest.

Manifest Review List

Manifest Date	Manifest #	Error Type(s)*	Error Description
9/14/90	89661606	B	This location, 7777 Edinger Ave., Huntington Beach, California,
			was owned and operated by J.C. Penney Co. at the time of
			disposal (Attachment 1 copy of manifest). The sublease
			between J.C. Penney and Bridgestone/Firestone was terminated
			on June 30, 1989. (Attachment 2 is a copy of the Sublease
			Termination Agreement.) Upon termination of the lease,
			Firestone ceased its tenancy and all operations at the store.
4/10/90	89653379	B	
4/10/90	89653379	B	This location, 7777 Edinger Ave., Huntington Beach, California,
			was owned and operated by J.C. Penney Co. at the time of
			disposal (Attachment 3 copy of manifest). The sublease
			between J.C. Penney and Bridgestone/Firestone was terminated
			on June 30, 1989. (Attachment 2 is a copy of the Sublease
			Termination Agreement.) Upon termination of the lease,
			Firestone ceased its tenancy and all operation at the store.

Attach additional copies of this form as necessary to list more manifests. If more room is need for descriptions, use 81/2 x 11 paper
* List letter code(s) for applicable error type(s), as provided in application.

Manifest Review List

Manifest Date	Manifest #	Error Type(s)*	Error Description
8/10/90	89643827	B	This location was not owned or operated by Firestone.
			(Attachment 4 copy of manifest). The address on the
			manifest, 24518 Lyons Ave., Newhall, CA, 91321 is Freeway
			Chevron and Auto Service (Attachment 5). At the time
			of the disposal, Firestone did not own or operate any
			retail stores in Newhall, California. An Independent Dealer
			Store may have sold Firestone tires, among other brands
			of tires, but was not owned, operated or controlled by
			Firestone or Bridgestone/Firestone Inc., or Bridgestone/
			Firestone North American Tire LLC (hereinafter "Bridgestone").
			Dealer Stores are owned and operated as independent
			businesses and are under no obligation to buy either
			equipment or products from Bridgestone. At no time did
			Bridgestone supply oil or gasoline or any other hazardous
			substance to its dealer stores. At no time did Bridgestone
			have control, ownership, authority or responsibilities

Attach additional copies of this form as necessary to list more manifests. If more room is need for descriptions, use 81/2 x 11 paper.
* List letter code(s) for applicable error type(s), as provided in application.

Manifest Review List

Manifest Date	Manifest #	Error Type(s)*	Error Description
			with regard to waste, or gasoline or waste oil tanks.at
			Dealer Stores, or the contents of gasoline or waste oil
			tanks at Dealer Stores. At no time was Bridgestone involved
			with the disposal of wastes or hazardous substance from
			Dealer Stores, and Bridgestone never instructed, controlled
			or directed Dealer Stores with regard to: (a) how to dispose
			of wastes, (b) who to use for disposal of waste, (c) who to use
			for transport of waste, or (d) where to send wastes for
			disposal or recycling. At no time was Bridgestone involved
			in the day-to-day operations at Dealer Stores, and accordingly,
			at no time did Bridgestone require Dealer stores to perform
			oil changes, formally or routinely inspect Dealer stores,
			demand certain products to be sold, nor require particular
			advertising. (Attachment 6 Firestone Dealership Agreement).
			Judicial decisions in this regard have consistently held
			that the independent dealer relationship does not create

Attach additional copies of this form as necessary to list more manifests. If more room is need for descriptions, use 81/2 x 11 paper

* List letter code(s) for applicable error type(s), as provided in application.

Manifest Review List

Manifest Date	Manifest #	Error Type(s)*	Error Description
			"a sufficient nexus" to warrant the imposition of arranger
			liability" under CERCLA. GE v. AAMCO Transmissions, Inc.,
			962 F.2d 281, 288 (2d Cir. 1992), U.S. v. Arrowhead Refining,
			829 F. Supp. 1078 (D. Minn. 1992), U.S. v. Arrowhead Refining,
			37 E.R.C. 1588 (D. Minn. 1993), Centerior Service Co. v.
			Acme Scrap Iron and Metal, 104 F. Supp. 2d 729 (N.D. Ohio
			2000) (Opinions included in Attachment 7).

Attach additional copies of this form as necessary to list more manifests. If more room is need for descriptions, use 81/2 x 11 paper.
* List letter code(s) for applicable error type(s), as provided in application.

State of California—Health and Welfare Agency
Form Approved, OMB No. 2050—0039 (Expires 9-30-91)
Please print or type. *(Form designed for use on elite (12-pitch typewriter).*

See Instructions on Back of Page 6 and Front of Page 7

Department of Health Services
Toxic Substances Control Division
Sacramento, California

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. / Manifest Document No.	CAD 010 013 271 08 / 000001
2. Page 1 of 1	Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
J. C. PENNEY CO. INC.
6131 ORANGETHORPE AVE.
BUENA PARK, CA 90624
4. Generator's Phone (714) 523-6853

FORMER: firestone service center
7777 edinger ave.
huntington beach

A. State Manifest Document Number: 89661606
B. State Generator's ID:
C. State Transporter's ID: 01405Z
D. Transporter's Phone: (213) 590-8531
E. State Transporter's ID:
F. Transporter's Phone:

5. Transporter 1 Company Name: FALCON ENVIRONMENTAL
6. US EPA ID Number: CAD 010 004 893 4
7. Transporter 2 Company Name:
8. US EPA ID Number:

9. Designated Facility Name and Site Address
OMEGA CHEMICAL CORPORATION
12504 WHITTIER BLVD.
WHITTIER, CA 90640
10. US EPA ID Number: CAD 041 224 500
G. State Facility's ID: CAD 041 224 500 01
H. Facility's Phone: (213) 698-0991

11. US DOT Description (Including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt./Vol.	I. Waste No.
a. "RQ" WASTE HAZARDOUS SUBSTANCE, LIQUID N.O.S. ORM-E NA9188 (TRICHLOROETHANE)	001	DM	010055	G	State 343 EPA/Other F001
b.					State EPA/Other
c.					State EPA/Other
d.					State EPA/Other

J. Additional Descriptions for Materials Listed Above
WATER CONTAMINATED WITH SOLVENTS

K. Handling Codes for Wastes Listed Above
a. 01 b.
c. d.

15. Special Handling Instructions and Additional Information
WEAR APPROPRIATE PROTECTIVE CLOTHING

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.

If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month Day Year
ROBERT ARNESON		08 29 90

17. Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month Day Year
William A Goldfinch		10 1 11 4 90

18. Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month Day Year

19. Discrepancy Indication Space

20. Facility Owner or Operator Certification of receipt of hazardous materials covered by this manifest except as noted in item 19

Printed/Typed Name	Signature	Month Day Year
R. Avalos		09 11 4 90

GENERATOR

TRANSPORTER

FACILITY

IN CASE OF AN EMERGENCY OR SPILL, CALL THE NATIONAL RESPONSE CENTER 1-800-424-8802. WITHIN CALIFORNIA CALL 1-800-852-7550

89661606

DHS 8022 A (1/88)
EPA 8700—22
(Rev. 9-88) Previous editions are obsolete

Do Not Write Below This Line

White: TSDF SENDS THIS COPY TO DOHS WITHIN 30 DAYS
To: P.O. Box 3000, Sacramento, CA 95812

Store No. 1069
Huntington Center
Huntington Beach, California
(TBA)

SUBLEASE TERMINATION AGREEMENT

AGREEMENT, dated as of the 30th day of June, 1989, by and between J. C. PENNEY COMPANY, INC., a Delaware corporation (hereinafter called "Landlord"), and BRIDGESTONE/FIRESTONE, INC. (successor-in-interest to The Firestone Tire & Rubber Company), an Ohio corporation (hereinafter called "Tenant").

W I T N E S S E T H:

WHEREAS, pursuant to a certain Sublease Agreement, dated as of June 1, 1983 by and between Landlord and Tenant there was demised and leased to Tenant certain premises (the "Demised Premises"), situated at 7777 Edinger Avenue, Huntington Center in the City of Huntington Beach, County of Orange, and State of California, which Demised Premises are more fully described in said Sublease Agreement; and

WHEREAS, said Sublease Agreement was amended by Amendments to Sublease dated October 11, 1983 and April 10, 1985; said Sublease Agreement as so amended is hereafter called the "Sublease";

WHEREAS, Landlord and Tenant now desire to have an early termination and cancellation of the Sublease; and

WHEREAS, Landlord and Tenant are duly authorized to enter into this Sublease Termination Agreement.

NOW, THEREFORE, in consideration of Ten Dollars ($10.00), the Premises, the mutual covenants herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, Landlord and Tenant do hereby covenant and agree as follows:

1. Termination - Effective Date - Payment. The Sublease and any subleasehold estate created therein in the Demised Premises shall be and the same are hereby terminated and cancelled and shall cease and come to an end on June 30, 1989,

R 11/16/89
1/22/90

(herein called the "Effective Date"). The Sublease shall continue in full force and effect until and Tenant shall pay rent and other charges due and payable or accruing under the Sublease up to and including the Effective Date. Landlord agrees that the rent payments and other charges paid by Tenant under the Sublease for the basement portion of the Demised Premises for the portion of the term of the Sublease from September 15, 1988 to the Effective Date and the rent payments and other charges paid by Tenant under the Sublease for the first floor portion of the Demised Premises for the months of July, August, September and October of 1989 shall be reimbursed to Tenant, and accordingly, Landlord shall pay Tenant in reimbursement of these payments and charges the amount of $75,337.98, in full reimbursement of the rent payments and charges for said periods. Payment shall be made by Landlord with the delivery of the fully executed copy of this Agreement to Tenant. Refer to Exhibit A attached hereto for the calculation of this reimbursement amount.

2. Surrender and Acceptance. As of the Effective Date, Tenant surrenders and yields to Landlord, and Landlord hereby accepts all and singular and yields to Landlord, and Landlord hereby accepts all and singular the Demised Premises described in and demised by the Sublease.

3. Compromise Settlement and Mutual Release. This Agreement is a compromise settlement and mutual release whereby Landlord and Tenant hereby extinguish their mutual rights and claims, arising from their disputes and differences as to the rights, duties and obligations each has arising from the Sublease of the Demised Premises and any claims for workers compensation brought by Tenant's employees working at the Demised Premises, except that this compromise settlement

and mutual release shall not pertain to, nor extinguish any mutual rights or claims arising from any disputes pertaining to any contamination or clean up costs associated with any waste oil tanks, located, or previously removed from the Demised Premises.

A. Tenant agrees that it shall not seek any indemnification or contribution from Landlord for any injuries or damages sustained by Tenant's employees while working at the Demised Premises.

B. Landlord and Tenant each hereto expressly does hereby fully, finally, and irrevocably release, remise, and forever discharge for itself, its successors and assigns of and the successors,, assigns, heirs, executors, administrators, next of kin, employees, officers, directors, agents, representatives, parent companies, subsidiaries, affiliates, and shareholders of each other party hereto, from any and all liability, claims, demands, rights, suits, actions, causes of action, damages, penalties, debts, and claims of damage of every kind, nature or character whatsoever, which that party or any one claiming through or under it may have, known or unknown, foreseen and unforeseen, whether presently in existence or which may arise in the future, stemming from their differences arising out of or in connection with the Sublease pertaining to the auto center located at the Demised Premises, except that this compromise settlement and mutual release shall not pertain to, nor extinguish any mutual rights or claims arising from any disputes pertaining to any contamination or clean up costs associated with any waste oil tanks, located, or previously removed from the Demised Premises.

C. This settlement is the compromise of the above mentioned disputed claims and shall not be treated as an admission of liability by any of the parties for any purpose.

D. This compromise settlement, notwithstanding Section 1542 of the California Civil Code which provides that "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor" shall be a full settlement of said dispute claim or cause of action except that this compromise settlement and mutual release shall not pertain to, nor extinguish any mutual rights or claims arising from any disputes pertaining to the waste oil tank on the site that has leaked product and contaminated the soil surrounding the above subject facility. Such compromise settlement shall act as a release of future claims that may arise from the above mentioned dispute whether such claims are currently known, unknown, foreseen, or unforseen. Landlord and Tenant understand and acknowledge the significance and consequence of such specific waiver of Section 1542 and hereby assume full responsibility for any injuries, damages, losses, or liability that they may hereafter incur for the above specified dispute.

4. Binding on Successors. This Agreement shall inure to the benefit of and be binding upon the devisees, executors, administrators, successors in interest and assigns of both Landlord and Tenant.

IN WITNESS WHEREOF, Landlord and Tenant have caused this Agreement to be duly executed and sealed the day and year first above written.

ATTEST:

Assistant Secretary

J. C. PENNEY COMPANY, INC.

By
Director of Real
Estate Operations

APPROVED
ATTORNEY

ATTEST:

Assistant Secretary

BRIDGESTONE/FIRESTONE, INC.

By
Vice President

STATE OF TEXAS)
) ss.
COUNTY OF DALLAS)

On this the 30th day of January, 1990, before me, a Notary Public duly authorized in and for the said County in the State aforesaid to take acknowledgments, personally appeared MICHAEL LOWENKRON, to be known and known to me to be the Director of Real Estate Operations of J. C. PENNEY COMPANY, INC., one of the corporations described in the foregoing instrument, and acknowledged that as such officer, being authorized so to do, he executed the foregoing instrument on behalf of said corporation by subscribing the name of said corporation by himself as such officer and caused the corporate seal of said corporation to be affixed thereto, as his free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My Commission Expires:

BETTY SUE WICKWARE
Notary Public
STATE OF TEXAS
My Comm. Exp 2-05-92

Betty Sue Wickware
Notary Public

STATE OF Illinois)
) ss.
COUNTY OF Cook)

On this the 26th day of January, 1990, before me a Notary public duly authorized in and for the said County in the State aforesaid to take acknowledgments, personally appeared J. M. Kaplan, to me known and known to me to be Vice President of BRIDGESTONE/FIRESTONE, INC., one of the corporations described in the foregoing instrument, and acknowledged that as such officer, being authorized so to do, she executed the foregoing instrument on behalf of said corporation by subscribing the name of such corporation by herself as such officer and caused the corporate seal of said corporation to be affixed thereto, as her free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My Commission Expires:

Vicki J. Gomberg
Notary Public

"OFFICIAL SEAL"
Vicki J. Gomberg
Notary Public, State of Illinois
My Commission Expires April 17, 1993

Please print or type (Form designed for use on elite (12-pitch typewriter)) — and Front of Page 1 — Sacramento, California

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No.: C A D 0 0 0 3 2 7 0 8 0 — Manifest Document No.: 0 0 0 0 1

2. Page 1 of 1 — Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
JC PENNY CO. INC.
6131 ORANGETHORPE AVE
BUENA PARK, CA. 90624
FORMER: FIRESTONE SERVICE CTR.
7777 EDINGER AVE
HUNTINGTON BEACH, CA

4. Generator's Phone: (714) 523-6853

A. State Manifest Document Number: 8965337 9

B. State Generator's ID:

5. Transporter 1 Company Name: FALCON ENVIRONMENTAL

6. US EPA ID Number: C A D 0 0 0 0 4 8 9 3 4

C. State Transporter's ID: 014052

D. Transporter's Phone: (213) 590-8531

7. Transporter 2 Company Name:

8. US EPA ID Number:

E. State Transporter's ID:

F. Transporter's Phone:

9. Designated Facility Name and Site Address
OMEGA CHEMICAL CORPORATION
12504 WHITTIER BLVD
WHITTIER, CA. 90640

10. US EPA ID Number: C A D 0 4 2 2 4 5 0 0 1

G. State Facility's ID: CAD042245001

H. Facility's Phone: (213) 698-0991

11. US DOT Description (Including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
a. "RQ" WASTE HAZARDOUS SUBSTANCE, LIQUID, N.O.S. ORM-E NA 9188 (TRICHLOROETHANE)	002	DM	00110	G	State 343 / EPA/Other F001
b.					State / EPA/Other
c.					State / EPA/Other
d.					State / EPA/Other

J. Additional Descriptions for Materials Listed Above: WATER CONTAMINATED WITH SOLVENTS

K. Handling Codes for Wastes Listed Above: a. 01 b. c. d.

15. Special Handling Instructions and Additional Information
WEAR APPROPRIATE PROTECTIVE CLOTHING
JOB# 20490734

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.

If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month	Day	Year
Robert Ainesun		03	10	90

17. Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year
G L JONES		10	11	90

18. Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year

19. Discrepancy Indication Space
NOTE: ONE DRUM WAS A LEAKER. HAD TO TRANSFER TO ANOTHER DRUM.

20. Facility Owner or Operator Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19.

Printed/Typed Name	Signature	Month	Day	Year
Billy L. Hanell		10	10	90

Do Not Write Below This Line

DHS 8022 A (1/88)
EPA 8700—22
(Rev. 9-88) Previous editions are obsolete

White- TSDF SENDS THIS COPY TO DOHS WITHIN 30 DAYS
To: P.O Box 3000, Sacramento, CA 95812

IN CASE OF AN EMERGENCY OR SPILL, CALL THE NATIONAL RESPONSE CENTER 1-800-424-8802; WITHIN CALIFORNIA CALL 1-800-852-7550

8965337 9

GENERATOR — TRANSPORTER — FACILITY

State of California—Health and Welfare Agency
Form Approved OMB No. 2050—0039 (Expires 9-30-91)
Please print or type. (Form designed for use on elite (12 pitch) typewriter)

See Instructions on Back of Page 6 and Front of Page 7

Department of Health Services
Toxic Substances Control Division
Sacramento, California

UNIFORM HAZARDOUS WASTE MANIFEST

1 Generator's US EPA ID No: CAD000003101 | Manifest Document No: 43827 | 2 Page 1 of 1 | Information in the shaded areas is not required by Federal law.

3 Generator's Name and Mailing Address: Firestone, 24518 W Lyons, Newhall, CA 91321

4 Generator's Phone ( )

A State Manifest Document Number: 89643827

B State Generator's ID:

5 Transporter 1 Company Name: TT Corporation | 6 US EPA ID Number: CAD000051760

C State Transporter's ID: 10956

D Transporter's Phone: 213-830-7811

7 Transporter 2 Company Name | 8 US EPA ID Number

E State Transporter's ID:

F Transporter's Phone:

9 Designated Facility Name and Site Address: OMEGA Recovery Services, 12512 E Whittier Blvd, Whittier, CA 90602 | 10 US EPA ID Number: CAD042245001

G State Facility's ID: CAM0121245001

H Facility's Phone: 800/852-8886

11 US DOT Description (Including Proper Shipping Name, Hazard Class, and ID Number)	12 Containers No	12 Containers Type	13 Total Quantity	14 Unit Wt/Vol	Waste No
a NON-RCRA, Hazardous Waste Solid, Debris from Fire	1	DM		P	State 352 / EPA/Other N/R
b NON-RCRA, Hazardous Waste Solid, material from Cleanup	1	DM		P	State 352 / EPA/Other N/R
c					State / EPA/Other
d					State / EPA/Other

J Additional Descriptions for Materials Listed Above: A Profile # 15336, B Profile # 16728

K Handling Codes for Wastes Listed Above: a 01 b 01 c d

15 Special Handling Instructions and Additional Information: A. Weights & volcum are approximate

16 GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.

If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: DORSEY-NEWN & ASSOC | Signature: [signature] TN # 237901 | Month Day Year

TRANSPORTER

17 Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name: Alfredo Ayala | Signature: [signature] | Month Day Year: 10 8 90

18 Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name | Signature | Month Day Year

FACILITY

19 Discrepancy Indication Space

20 Facility Owner or Operator Certification of receipt of hazardous materials covered by this manifest except as noted in item 19

Printed/Typed Name: JUAN DEL REAL | Signature: [signature] | Month Day Year: 10 10 90

DHS 8022 A (1/88)
EPA 8700—22
(Rev 9-88) Previous editions are obsolete.

Do Not Write Below This Line

White: TSDF SENDS THIS COPY TO DOHS WITHIN 30 DAYS

To: P.O. Box 3000, Sacramento, CA 95812

IN CASE OF AN EMERGENCY OR SPILL, CALL THE NATIONAL RESPONSE CENTER 1-800-424-8802, WITHIN CALIFORNIA CALL 1-800-852-7550

8 96438 27

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MSN Yellow Pages

with verizon SUPERPAGES.COM

What's Nearby

Print-Friendly Version

Business Profile

Freeway Chevron & Auto Service Center

Appears in the Categories:
Auto Service & Repair

Contact Info:
(661) 255-7125

Location Info:
24518 Lyons Avenue, Newhall, CA 91321
map | driving directions

Products & Services:
Maintenance

Firestone

DEALERSHIP AGREEMENT

AGREEMENT between The Firestone Tire & Rubber Company ("Company")

and ..... of ..... ("Dealer")

dated .....

COMPANY'S UNDERTAKINGS: Company hereby licenses Dealer to identify its premises with Firestone dealership signs as an authorized Firestone Direct Dealer according to Company's published policy in effect from time to time. Company grants to Dealer the right to purchase such Firestone tires, tubes, batteries, home and auto accessories ("TBA") as Company has to offer for sale at Company's regular Direct Dealer Prices in effect at the time of shipment. Company's sale of TBA products shall be made in accord with the terms and conditions set forth on the reverse side of this Agreement. Company further agrees to participate or co-op in Dealer's advertising of Company's TBA products in accordance with Company's published policy in effect during the term of this Agreement.

DEALER'S UNDERTAKINGS: In consideration for the foregoing, Dealer agrees to honor Company's warranty program; provide quality supporting services to purchasers of Firestone TBA products; use its best efforts to vigorously advertise and promote the sale of Firestone TBA products; and to return tire retail purchaser recordation information to, and in form determined by, Company. Dealer accepts responsibility for the placing and condition of any signs furnished by Company and agrees to hold Company harmless by reason of Dealer's use of such signs. Upon termination of this Agreement for any reason, Dealer agrees to immediately discontinue the use of and remove from its premises all Firestone dealership signs and other identification or association with Company. Company shall have the right to enter upon Dealer's premises to remove all property furnished by Company and all dealership signs, painted or otherwise, on the premises or on or attached to windows or walls of the building showing any identification of the premises with Company.

TERM OF AGREEMENT: This Agreement shall commence upon execution hereof and continue in effect until terminated as hereinafter provided. Either Company or Dealer shall have the absolute right, with or without cause, to terminate this Agreement upon sixty (60) days prior written notice to the other party, in which event this contract shall terminate at the end of such 60 day period. In addition, either party may terminate this Agreement on breach by the other party with or without notice. Termination of this Agreement shall ipso facto terminate all other contracts or agreements in effect between the parties, except Dealer's obligation to pay for TBA products delivered or monies advanced to Dealer during any term this or any prior Agreement is in effect including all notes, security agreements, guarantees, pledges, and other promises evidencing or securing the obligation or payment thereof. In no event shall damages of any nature be claimed by Dealer by reason of cancellation pursuant to either of the above provisions.

This AGREEMENT shall be governed by the laws of the State of Ohio. The conditions on the reverse side of this Agreement are expressly made a part hereof. This Agreement and Company's published policies in effect from time to time constitute the entire understanding between Dealer and Company, and there are no obligations, representations, promises, or conditions other than as stated therein. No change, modification, or claim of waiver of any term hereof shall be recognized, except as evidenced in writing signed by Dealer and by a Vice President of Company.

THE FIRESTONE TIRE & RUBBER COMPANY • AKRON, OHIO 44317

By .....
District Manager

ACCEPTED:

.....
Dealer

Firestone

Dealership Agreement

Dated ..... , 19.

Issued to

....
(Owner's Name)

....
(Business Name)

....
(Street Address)

Town ....

State ....

Date of Original Contract to Establish Continuous Dealership Agreement ...

by

THE FIRESTONE
TIRE & RUBBER COMPANY
AKRON, OHIO 44317

TERMS AND CONDITIONS OF SALE

1. Title to TBA purchased shall pass to Dealer F.O.B. point of shipment. Shipping terms and payment terms are in accordance with Company's published policy in effect at time of shipment.
2. Prices for TBA are in accordance with Company's regular direct dealer prices in effect on date order is shipped. In event that Company increases its prices between date of order and date of shipment, Dealer may cancel the balance of any unshipped order by prior written notice to Company. In the event of a price reduction, price protection shall be in accordance with Company's published policy in effect at time of reduction.
3. Company may, at its discretion, decline to make deliveries, except for cash, whenever it deems such decision necessary or advisable. Company shall not be liable for non-delivery, delay in delivery, or apportionment of products ordered hereunder attributable to causes beyond Company's reasonable control.
4. Dealer agrees to carry in its name, without expense to Company, insurance on its inventory of TBA products sufficient to protect its indebtedness to Company.
5. Dealer shall assume and pay any excise, tax, or levy by any governmental authority upon or by reason of the manufacture or materials thereof, or its component parts, or any assessment by reason of actual sale when made or the use thereof.
6. Firestone TBA products are warranted against defects in workmanship and material, and against road hazards in accordance with Company's then current published warranties. Dealer shall make all TBA adjustments in strict accordance with Company's adjustment policy in effect at time of sale and adjustment. Company shall in no event be responsible for or charged with any adjustment made by Dealer which is contrary to or otherwise without Company's policy.
7. This contract shall not constitute Dealer an Agent of Company for any purpose whatsoever. Dealer agrees not to exhibit Firestone TBA products at any trade show, fair, or exposition without the express consent of Company. Dealer shall not represent to or do any act which could cause any third party to reasonably believe that Dealer is an Agent of Company.

DATE OF THIS CONTRACT_____ DATE OF ORIGINAL CONTRACT TO ESTABLISH CONTINUOUS DIRECT DEALERSHIP_____

*Owner's Name*_____

*Business Name*_____

*Street Address*_____

*Town*_____ *Zip Code*_____

*County*_____ *State*_____

*R. F. D. Number*_____ *From*_____

*District Office*_____

*Territory Salesman*_____ *Territory Number*_____

*Invoiced By*_____

Direct Dealer represents that it will handle the following Firestone TBA products:	Initial Order $	Direct Dealer further represents that it will purchase from Firestone the following annual dollar volume of TBA products: First Year $	Subsequent Year $
Tires & Tubes Passenger			
Truck			
Farm Tractor & Implement			
Retreads			
Batteries			
Brake Lining			
Appliances, TV & Radio			
Other H & A Supplies			
Repair Mat'l & Camelback			

*Principal Business*_____

*Reasons for Change*_____

*Type of Building*_____ *Ann. Vol. All Depts.*_____

*No. Outlets Available*_____ *No. Closed on Contract*_____

*Make of Car, Truck, Tractor*_____ *Make of Gasoline*_____

*Replaces (Former Dealer)*_____

Write Special Report to District Manager giving services Dealer is equipped to render. Attach order for signs, announcement campaign, merchandising service, etc.

(PRINT INFORMATION) (SEND STUB TO HOME OFFICE)

Firestone DEALERSHIP AGREEMENT

AGREEMENT between The Firestone Tire & Rubber Company ("Company")

and ..... of ..... ("Dealer")

dated .....

COMPANY'S UNDERTAKINGS: Company hereby licenses Dealer to identify its premises with Firestone dealership signs as an authorized Firestone Direct Dealer according to Company's published policy in effect from time to time. Company grants to Dealer the right to purchase such Firestone tires, tubes, batteries, home and auto accessories ("TBA") as Company has to offer for sale at Company's regular Direct Dealer Prices in effect at the time of shipment. Company's sale of TBA products shall be made in accord with the terms and conditions set forth on the reverse side of this Agreement. Company further agrees to participate or co-op in Dealer's advertising of Company's TBA products in accordance with Company's published policy in effect during the term of this Agreement.

DEALER'S UNDERTAKINGS: In consideration for the foregoing, Dealer agrees to honor Company's warranty program; provide quality supporting services to purchasers of Firestone TBA products; use its best efforts to vigorously advertise and promote the sale of Firestone TBA products; and to return tire retail purchaser recordation information to, and in form determined by, Company. Dealer accepts responsibility for the placing and condition of any signs furnished by Company and agrees to hold Company harmless by reason of Dealer's use of such signs. Upon termination of this Agreement for any reason, Dealer agrees to immediately discontinue the use of and remove from its premises all Firestone dealership signs and other identification or association with Company. Company shall have the right to enter upon Dealer's premises to remove all property furnished by Company and all dealership signs, painted or otherwise, on the premises or on or attached to windows or walls of the building showing any identification of the premises with Company.

TERM OF AGREEMENT: This Agreement shall commence upon execution hereof and continue in effect until terminated as hereinafter provided. Either Company or Dealer shall have the absolute right, with or without cause, to terminate this Agreement upon sixty (60) days prior written notice to the other party, in which event this contract shall terminate at the end of such 60 day period. In addition, either party may terminate this Agreement on breach by the other party with or without notice. Termination of this Agreement shall ipso facto terminate all other contracts or agreements in effect between the parties, except Dealer's obligation to pay for TBA products delivered or monies advanced to Dealer during any term this or any prior Agreement is in effect including all notes, security agreements, guarantees, pledges, and other promises evidencing or securing the obligation or payment thereof. In no event shall damages of any nature be claimed by Dealer by reason of cancellation pursuant to either of the above provisions.

This AGREEMENT shall be governed by the laws of the State of Ohio. The conditions on the reverse side of this Agreement are expressly made a part hereof. This Agreement and Company's published policies in effect from time to time constitute the entire understanding between Dealer and Company, and there are no obligations, representations, promises, or conditions other than as stated therein. No change, modification, or claim of waiver of any term hereof shall be recognized, except as evidenced in writing signed by Dealer and by a Vice President of Company.

THE FIRESTONE TIRE & RUBBER COMPANY • AKRON, OHIO 44317

By.....
District Manager

RETAIN AT DISTRICT OFFICE

ACCEPTED:

.....
Dealer

S725-Rev. 3-75

TERMS AND CONDITIONS OF SALE

1. Title to TBA purchased shall pass to Dealer F.O.B. point of shipment. Shipping terms and payment terms are in accordance with Company's published policy in effect at time of shipment.
2. Prices for TBA are in accordance with Company's regular direct dealer prices in effect on date order is shipped. In event that Company increases its prices between date of order and date of shipment, Dealer may cancel the balance of any unshipped order by prior written notice to Company. In the event of a price reduction, price protection shall be in accordance with Company's published policy in effect at time of reduction.
3. Company may, at its discretion, decline to make deliveries, except for cash, whenever it deems such decision necessary or advisable. Company shall not be liable for non-delivery, delay in delivery, or apportionment of products ordered hereunder attributable to causes beyond Company's reasonable control.
4. Dealer agrees to carry in its name, without expense to Company, insurance on its inventory of TBA products sufficient to protect its indebtedness to Company.
5. Dealer shall assume and pay any excise, tax, or levy by any governmental authority upon or by reason of the manufacture or materials thereof, or its component parts, or any assessment by reason of actual sale when made or the use thereof.
6. Firestone TBA products are warranted against defects in workmanship and material, and against road hazards in accordance with Company's then current published warranties. Dealer shall make all TBA adjustments in strict accordance with Company's adjustment policy in effect at time of sale and adjustment. Company shall in no event be responsible for or charged with any adjustment made by Dealer which is contrary to or otherwise without Company's policy.
7. This contract shall not constitute Dealer an Agent of Company for any purpose whatsoever. Dealer agrees not to exhibit Firestone TBA products at any trade show, fair, or exposition without the express consent of Company. Dealer shall not represent to or do any act which could cause any third party to reasonably believe that Dealer is an Agent of Company.

DATE OF THIS CONTRACT_____ DATE OF ORIGINAL CONTRACT TO ESTABLISH CONTINUOUS DIRECT DEALERSHIP_____

*Owner's Name*_____

*Business Name*_____

*Street Address*_____

*Town*_____ *Zip Code*_____

*County*_____ *State*_____

*R. F. D. Number*_____ *From*_____

*District Office*_____

*Territory Salesman*_____ *Territory Number*_____

*Invoiced By*_____

Direct Dealer represents that it will handle the following Firestone TBA products:	Initial Order $	Direct Dealer further represents that it will purchase from Firestone the following annual dollar volume of TBA products:	
		First Year $	Subsequent Year $
Tires & Tubes Passenger			
Truck			
Farm Tractor & Implement			
Retreads			
Batteries			
Brake Lining			
Appliances, TV & Radio			
Other H & A Supplies			
Repair Mat'l & Camelback			

Principal Business _____

Reasons for Change _____

Type of Building _____ *Ann. Vol. All Depts.* _____

No. Outlets Available _____ *No. Closed on Contract* _____

Make of Car, Truck, Tractor _____ *Make of Gasoline* _____

Replaces (Former Dealer) _____

Write Special Report to District Manager giving services Dealer is equipped to render. Attach order for signs, announcement campaign, merchandising service, etc.

(PRINT INFORMATION)

Firestone

ASSOCIATE DEALERSHIP AGREEMENT

AGREEMENT, between authorized Firestone Supply Point Dealer, ... of ..... ("Supply Dealer"), and ..... of ..... ("Associate Dealer") covering the supply of Firestone tires, tubes, batteries, and auto accessories (TBA).

1. Supply Dealer agrees to supply Associate Dealer its needs of Firestone TBA products in accordance with Supply Dealer's prices and delivery terms in effect on date of shipment. Supply Dealer's prices and delivery terms are subject to change without notice. If prices are advanced, Associate Dealer may cancel the balance of any unshipped order on prior notice to Supply Dealer. Supply Dealer may, at its election, decline to deliver products except for cash.

2. Subject to approval of The Firestone Tire & Rubber Company, Associate Dealer will be authorized to identify its premises with authorized Firestone Associate Dealership signs in accord with the published policy of that Company. Associate Dealer may also participate in all advertising and promotional benefits of an authorized Firestone Associate Dealer.

3. In consideration of the foregoing, Associate Dealer agrees to honor Firestone's published product warranty policy in effect from time to time in strict accordance with its terms, and to supply quality supporting services to retail purchasers of Firestone TBA products.

4. This Agreement does not constitute Associate Dealer an Agent of Supply Dealer or of The Firestone Tire & Rubber Company. It is not transferable or assignable, and is terminable by either party on thirty (30) days prior written notice to the other party, without liability of one party to the other, except for payment for products sold and delivered.

..... *(Date)*

..... *Authorized Firestone Supply Point Dealer*

..... *License approved by The Firestone Tire & Rubber Company*

..... *Firestone Associate Dealer*

FIRESTONE T.B.A. SALES AND MERCHANDISING ESSENTIALS (Order Form)

☐ *T.B.A. SALES AND SERVICE DATA BOOK
First year's subscription, includes binder, index, revisions.

Price _____

Above subscriptions will be automatically renewed each year in February unless canceled.

Ship to _____ Address _____ City _____ State _____
Firm Name - Please Print

Charge to _____ Address _____ City _____ State _____
Supply Point - Please Print

Dealer Signature _____ Supply Point Dealer Signature _____

5709 Rev. 3-75 *(District to prepare and forward S-1175X to Akron for these subscriptions) DUPLICATE (Return to Supply Point)

DATE OF THIS CONTRACT _____ DATE OF FIRESTONE ASSOCIATE CONTRACT TO ESTABLISH CONTINUOUS DEALERSHIP _____

Owner's Name _____

Business Name _____

Street Address or R.F.D. No. _____

Town _____ Zip Code _____

County _____ State _____

Supply Point Dealer _____

Street Address _____

Town _____ State _____

District Office _____

Territory Salesman _____ Territory Number _____

Associate Dealer represents that he will handle following Firestone TBA products:	Initial Order $	Associate Dealer represents that he will purchase from Firestone the following annual dollar volume of TBA products First Year $	Subsequent Yrs. $
Tires & Tubes Passenger			
Truck			
Farm Tractor & Implement			
Retreads			
Batteries			
Brake Lining			
Appliances, TV, & Radio			
Other H & A Supplies			
Repair Mat'l & Camelback			

PRINCIPAL BUSINESS _____
REASON FOR CHANGE _____
TYPE OF BUILDING _____ ANN. VOL. ALL DEPTS. _____
NO. OUTLETS AVAILABLE _____ NO. CLOSED ON CONTRACT _____
MAKE OF CAR, TRUCK, TRACTOR _____ MAKE OF GASOLINE _____
REPLACES (FORMER DEALER) _____
Write Special Report to District Manager giving services Associate Dealer is equipped to render. Attach order for signs, announcement campaign, merchandising service, etc.

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

AAMCO TRANSMISSIONS, INC.; Central Albany, Inc.; Robert Fowler, (formerly doing business as A & B Avco); A & B Service Center, (successor to A & B Avco); Sylvester Brackett, doing business as Brackett's Sunoco Station; Charles Smith, doing business as Smith's Automotive and Charles H. Smith's Auto Repairing, (formerly doing business as Charlie Smith Texaco); Harry Malone, doing business as Chick's Sunoco, (formerly doing business as Chick's Auto Service and Chick's Gulf); Colonie Import Distributors Ltd.; John H. Ellsworth, doing business as Gulf Service Station; George's Mobil Mart; James Morgan, doing business as Jim's Northway Arco Service Station; Latham Auto Lab, Inc. and Latham Mobile Mart; Lehmann's Garage; Marshall's Garage, Inc.; Allan Kowsky; Park Tire Sales and Service Center; Two World Tires; Ronald J. Gizzi, doing business as Ron's Service Center; Richard B. Tullock, doing business as Tullock's Service Station; Gulf Oil Company; Shell Oil Company and Atlantic Richfield Company, Defendants,

Gulf Oil Company; Shell Oil Company and Atlantic Richfield Company,
Defendants-Appellees.

No. 933, Docket 91-7980.

United States Court of Appeals,
Second Circuit.

Argued March 3, 1992.

Decided May 13, 1992.

Judgment debtor brought action against oil companies and their service station tenants to recover contribution for response costs for cleaning up site of waste motor oil disposal. The United States District Court for the Northern District of New York, Con. G. Cholakis, J., entered summary judgment in favor of companies. Judgment debtor appealed. The Court of Appeals held that oil companies were not "arrangers" of disposal of their service station tenants' waste oil and, therefore, were not liable on that basis.

Affirmed.

1. Health and Environment ⇐25.5(5.5)

Oil companies were not "arrangers" of their service station tenants' disposal of waste oil and, therefore, were not liable on that basis under CERCLA, even if companies had ability or opportunity to control the disposal, and even though companies leased underground storage tanks to tenants, sold virgin motor oil to them, and exercised control over certain aspects of tenants' businesses; companies had no obligation to exercise control over disposal of waste oil. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3), 42 U.S.C.A. § 9607(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

2. Health and Environment ⇐25.5(5.5)

Mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another does not itself create obligation under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 107(a)(3), 42 U.S.C.A. §§ 9601 et seq., 9607(a)(3).

3. Health and Environment ⇐25.5(5.5)

Although arranger liability under CERCLA can attach to parties that do not have active involvement regarding timing, manner, or location of disposal, there must be some nexus between potentially responsible party and disposal of hazardous substance. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3), 42 U.S.C.A. § 9607(a)(3).

4. Health and Environment ⇐25.5(5.5)

Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for disposal of hazardous sub-

stances. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3), 42 U.S.C.A. § 9607(a)(3).

5. Health and Environment ⇐25.5(5.5)

Factors which make owner or operator responsible party do not apply with equal force in determining arranger liability under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(1–4), 42 U.S.C.A. § 9607(a)(1–4).

6. Health and Environment ⇐25.5(5.5)

Oil companies could not be held liable under CERCLA on theory that they aided and abetted their service station tenants' disposal of waste motor oil; nothing indicated that companies gave assistance or encouragement to the disposal or that they had knowledge of breach of duty concerning disposal of the oil. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

Daniel R. Solin, Solin & Breindel, New York City, for plaintiff-appellant.

Michael A. Smith, Chevron, Houston, Tex., for defendant-appellee Gulf Oil Co.

Scott A. Barbour, McNamee, Lochner, Titus & Williams, Albany, N.Y., for defendant-appellee Shell Oil Co.

David K. Floyd, Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, N.Y., for defendant-appellee Atlantic Richfield Co.

Before: CARDAMONE and ALTIMARI, Circuit Judges, TELESCA, District Judge.*

PER CURIAM:

INTRODUCTION

Plaintiff–Appellant, General Electric Company ("General Electric"), appeals from the decision of the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*) granting summary judgment in favor of defendants-appellees, Gulf Oil Company ("Gulf"), Shell Oil Company ("Shell") and Atlantic Richfield Oil Company ("ARCO"), and from a subsequent Order, entered September 17, 1991, which directed the entry of partial final judgment in favor of Gulf, Shell and ARCO (collectively, "the oil companies"), pursuant to Fed.R.Civ.P. 54(b).

This action arose out of a previous cost recovery action in which the appellant, General Electric, was a defendant. That action, *State of New York v. Wray, et al.*, No. 83–CZ–1621, was filed in 1983 and amended to include General Electric in 1984. In *Wray*, the State of New York ("the State") alleged that between 1975 and 1980, H. Eugene Wray and Albany Waste Oil (collectively, "Wray") transported various hazardous substances from General Electric's and other defendants' facilities to a storage site on Waite Road ("the Waite Road site"). The State claimed that hazardous wastes stored at the Waite Road site, which was located on freshwater wetlands, had leaked into the surrounding soil, surface water and groundwater. The State sought, through the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, to hold the defendants liable for the response costs that had been and would be incurred in an effort to clean up the Waite Road site.

On June 7, 1990, the State, General Electric and most of the other defendants agreed to settle the *Wray* action by entering into a Consent Judgment. The Consent Judgment provided that General Electric would undertake and fund the clean-up of the Waite Road site in accordance with a Remedial Action Plan, but permitted General Electric to pursue a subsequent contribution action against any potential defendants that did not participate in the Consent Judgment. General Electric alleges that it has spent over 1.6 million dollars in

* Honorable Michael A. Telesca, Chief Judge, United States District Court for the Western District of New York, sitting by designation.

performing the remediation that it agreed to undertake in the Consent Judgment.

On June 18, 1990, General Electric exercised its right to seek contribution by filing this action against thirty individual service stations, which it alleges arranged for the disposal or transport of waste oil stored at the Waite Road site. On December 10, 1990, General Electric filed an amended complaint, adding Shell, ARCO and Gulf as defendants. General Electric alleges that the oil companies, who leased service station facilities and sold petroleum products to some of the service station defendants, are liable under CERCLA for response costs incurred by General Electric in the clean-up of the Waite Road site.

General Electric seeks to hold the oil companies liable under CERCLA as entities that arranged for the disposal or treatment of a hazardous substance, namely waste motor oil that was stored by dealers at service stations they leased from the oil companies. *See* 42 U.S.C. § 9607(a)(3). Following extensive discovery, the oil companies moved for summary judgment. In a decision rendered from the bench, the district court stated that

> G.E. maintains the legal standard is that the party sought to be held liable need only be shown to have the opportunity or authority to control the place or manner of disposal, which apparently means if the parties could have arranged for the disposal of waste, that party may be liable as an arranger. This, in the court's judgment, is not the standard. Here, even assuming the oil companies could have directed the dealers to dispose of their wastes in a particular manner, the record is undisputed that the companies did not do so.

(A–37–38).[1] Thus, the district court concluded that the oil companies were not liable as "arrangers" under CERCLA, and granted their motion for summary judgment. This appeal followed.

1. Citations to (A–__) are references to the Joint Appendix on appeal.

BACKGROUND

From 1953 until 1980, H. Eugene Wray owned and operated a waste oil business in the Albany, New York area. In 1977, Wray hired Scott A. Fayville, who was Wray's only employee, and together they picked up waste oil from several major corporations, including General Electric. In addition, they scavenged waste oil from over one hundred local automobile dealerships, garages and service stations. Three of the dealers that allegedly allowed Wray and Fayville to pump and carry away waste oil from their stations' storage tanks were Sylvester Brackett, Harry Malone (doing business as Chick's Service Station) and James Morgan (doing business as Jim's Northway). All three dealers are named as defendants in this action.

Each of these dealers had a relationship with one of the oil company defendants.[2] Although their relationships differed somewhat in detail, they were fundamentally the same in all respects material to this action. Each of the dealers entered into a detailed lease agreement with his respective oil company, which provided for the lease of service station premises and equipment. The leased equipment included, in each case, an underground tank used for storing waste motor oil until it was disposed of. The dealers also agreed, either in lease agreements or supplemental agreements, to maintain the premises in a certain manner, keep specific minimum hours and purchase minimum amounts of their respective oil company's products. Although it appears that in some cases, the dealers were not required to purchase only those products manufactured by their respective oil companies, at least one dealer believed he was required to do so, and all three of the dealers testified that they in fact purchased petroleum products sold at their stations solely from their respective oil companies.

Each lease or supplemental agreement set forth specific lessor-dealer responsibili-

2. The relationships between the dealers and the oil companies were as follows: Sylvester Brackett—Gulf; Harry Malone—Shell; James Monroe—ARCO.

ties for the maintenance and upkeep of the dealer's service station. For example, in its agreement with Mr. Monroe, ARCO required the dealer to perform daily or weekly maintenance and checks on the underground gasoline storage tanks. ARCO also required that the dealer make sure that the underground tank used for storing waste oil "is emptied as required and that the piping to the tank is kept free of waste, etc." Similarly, in a document entitled "Lessee's Maintenance Obligations," Shell required Mr. Malone to "empty [the] waste oil tank." Gulf made no reference to the waste oil tank in its agreement with Mr. Brackett regarding their respective maintenance responsibilities.

In accordance with the terms of their lease and supplemental agreements, the oil companies encouraged their dealers to sell gasoline and motor oil at competitive prices and conducted periodic inspections to ensure that the station premises and equipment were clean and well-maintained. All three lease agreements did, however, contain a clause providing that the dealers remained independent businessmen. The clause in Shell's agreement with Mr. Malone typifies the language found in each of the leases. It provides that

> [n]othing in this lease shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, the business or operations of Lessee on the premises, but the entire control and direction of such business and operations shall be and remain in Lessee, subject only to Lessee's performance of the obligations in this Lease.

(A–415; A–179; A–1308).

As part of their service station operations, each of the dealers during at least some of the period covered by this action, performed oil changes and provided repair services for customers. Dirty oil from engine crank cases was removed from the automobiles and stored in underground waste oil storage tanks until it was removed from the premises by waste oil scavengers.[3] The dealers replaced the used oil with virgin motor oil manufactured by their respective oil companies. Some of the dealers purchased this oil directly from the oil companies, while others purchased it from a "jobber" or middleman. While the oil companies encouraged their dealers to purchase and sell as much of their petroleum products as possible, none of the oil companies required their dealers to perform oil changes.

Although the oil companies' representatives periodically inspected the waste oil tanks and other equipment leased to the dealers, none of them made any recommendations to their dealers regarding the proper way to dispose of waste motor oil, and none of them participated in the decision of how, when or where to dispose of waste oil.

DISCUSSION

[1] The primary issue that faces us in this appeal is whether the oil companies arranged for the disposal of hazardous waste pursuant to 42 U.S.C. § 9607(a)(3). In granting the oil companies' motion for summary judgment, the district court determined that it was undisputed that the oil companies had not directed the dealers to dispose of the waste oil in any particular manner, and in fact that "the responsibility for making arrangement for the disposal of the waste was left totally to the dealers." (A–38).

On appeal, General Electric contends that the district court erred in holding that, in order to be liable as arrangers, the oil companies must have been actively involved in the timing, manner or location of disposal. Appellant argues that, in light of CERCLA's broad scope, this court should interpret arranger liability to include those who have the *ability* or *authority* to direct or control the disposal of hazardous wastes, even though they never participated in the actual decision of how or where to dispose of them. Under this much broader standard, appellants urge

3. Waste oil scavengers came to the dealers' stations periodically to remove the waste oil from the storage tanks. None of the dealers ever paid the scavengers for removing the oil, nor did they receive payment for permitting the scavengers to remove it.

that a genuine issue of material fact exists as to whether the oil companies' allegedly pervasive control of the dealers' day-to-day activities gave them the authority to influence the dealers' waste disposal practices.

As this appeal comes to us on the district court's grant of summary judgment in favor of the defendants-appellees, we must engage in a *de novo* review of the record. We will affirm the district court only if we agree that there is no genuine issue as to any material facts, and that the appellant is entitled to judgment as a matter of law. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir.1992).

A. CERCLA's Statutory Scheme:

CERCLA is a broad, remedial statute enacted by Congress in order to enable the Environmental Protection Agency (the "EPA") to respond quickly and effectively to hazardous waste spills that threaten the environment, and to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), U.S.Code Cong. & Admin.News 1980, 6119, *reprinted in* 1 CERCLA Legislative History at 320. Under CERCLA, the EPA is authorized to undertake remedial efforts to clean up hazardous waste spills and, where an "imminent and substantial endangerment to the public health exists," to take legal action in order to compel potentially liable parties to undertake their own private clean-up efforts. *Murtha*, 958 F.2d at 1196; 42 U.S.C. § 9606(a).

In enacting CERCLA, Congress established four groups of responsible parties, all of whom are liable regardless of intent, and provided a limited number of narrowly constructed defenses to CERCLA liability. 42 U.S.C. § 9607(a) and (b). Through this scheme of liability Congress envisioned a system that would permit the EPA to recoup its costs from a source of funds other than the taxpayers. It was Congress' intent that CERCLA be construed liberally in order to accomplish these goals. *Murtha*, at 1198.

In order to establish a prima facie case of CERCLA liability, a plaintiff must prove that (1) the defendant is a responsible party as defined by section 9607(a)(1)–(4); (2) that the site at issue is a "facility" as defined by section 9601(9); (3) that there has been a release of hazardous substances at the facility or that such a release is threatened; (4) that the plaintiff has incurred response costs in connection with that release; and that (5) the costs incurred and the response actions taken conform to the National Contingency Plan set up under CERCLA. *Id.* at 1198.

Under CERCLA's liability provision, responsible parties include generators of hazardous waste, present or past owners at the time of disposal of facilities where hazardous wastes are disposed of, transporters of hazardous wastes, and those who arrange for the disposal or transport of hazardous waste. 42 U.S.C. § 9607(a); *Murtha*, at 1198; *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir.1990). The only issue raised on this appeal is whether the defendants-appellees are liable as entities that arranged for the disposal of a hazardous substance.

B. Arranger Liability Under § 9607(a)(3):

Section 9607(a)(3) provides that,

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,

shall be liable for any necessary response costs consistent with the National Contingency Plan. Disposal, as it is used in section 9607, is statutorily defined. *See* 42 U.S.C. § 9601(29); 42 U.S.C. § 6903(3). Likewise, the terms "hazardous substance," "facility," and "treatment" are all expressly defined by Congress. *See* 42 U.S.C. § 9601(9), (14), (29). Congress has not, however, provided a definition for the phrase "otherwise arranged"—the term

which is critical to a determination of the appellees' liability for response costs incurred by the appellant in connection with the Waite Road site. *See Florida Power & Light*, 893 F.2d at 1317.

Appellant, General Electric, urges this court to read the phrase "otherwise arranged" to include those entities that had the ability or authority to control the waste disposal practices of a third party, even though they never took part in the decision of how, when or where to dispose of the hazardous substance. General Electric argues that this interpretation of section 9607(a)(3) is entirely consistent with CERCLA's broad, remedial structure, and would satisfy Congress' goal of ensuring that those responsible for environmental contamination shoulder the cost of its clean-up.

[2] The appellant's argument is appealing, but this court cannot conclude that by enacting § 9607(a)(3), Congress intended to hold any entity that merely had the opportunity or ability to control a third party's waste disposal practices liable as an entity that "otherwise arranged for" disposal or transport of hazardous waste. While "persons cannot escape liability by 'contracting away' their responsibility or by alleging that [an] incident was caused by the act or omission of a third party[,]" the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another, does not itself *create* an obligation under CERCLA. *See New York v. General Electric Co.*, 592 F.Supp. 291, 297 (N.D.N.Y.1984).

[3, 4] Although arranger liability can attach "to parties that do not have active involvement regarding the timing, manner or location of disposal," *CPC International, Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269, 1279 (W.D.Mich.1991), there must be some nexus between the potentially responsible party and the disposal of the hazardous substance. *See id.* at 1278; *see also Murtha*, at 1199. This nexus is premised upon the potentially liable party's conduct with respect to the disposal or transport of hazardous wastes. 42 U.S.C. § 9607(a). In other words, Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.

Almost all of the courts that have held defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of waste. *E.g., United States v. Bliss*, 667 F.Supp. 1298, 1306 (E.D.Mo.1987) (defendant had "ultimate authority for decisions regarding disposal" and actively participated in the arrangement of transportation for hazardous substances); *United States v. Ward*, 618 F.Supp. 884, 894–95 (E.D.N.C.1985) (corporate officer who was personally involved in decision to dispose of hazardous substance was liable as an arranger even if he did not know where waste would be disposed of).

The few courts that have held an entity responsible as an arranger in the absence of actual involvement have found that nexus between the potentially liable party and the disposal of hazardous substances to be some obligation to arrange for or direct their disposal. *E.g., CPC International*, 759 F.Supp. at 1278 ("[t]he nexus issue is not a test of whether a party created or left hazardous substances or had title to them, but rather whether the party *assumed responsibility* for determining their fate") (emphasis added).

For example, in *United States v. ACETO Agricultural Chemicals Corp.*, the court held that the defendant, who hired another company to formulate a commercial grade pesticide, would be liable as an arranger if it was established that the defendant owned the technical grade pesticide, the work in progress and the final product and, in addition, knew that the generation of hazardous wastes was inherent in the formulation process. 872 F.2d 1373, 1381 (8th Cir.1989); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 959 F.2d 126,

131–32 (9th Cir.1992); *see also Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F.Supp. 1448, 1452 (N.D.Cal.1991), *as clarified by Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F.Supp. 1452, 1453 (N.D.Cal.1991) (issue of whether there is a sufficient nexus between chemical companies' acts and disposal of hazardous waste turns on whether "generation of hazardous waste was inherent in the process and whether the chemical companies retained ownership of the chemicals and, therefore authority to control the work in process at all times"). Thus, courts have found that ownership of hazardous substance, when combined with actual control over the process that generates the hazardous waste, supports arranger liability.

Here, the undisputed facts demonstrate that the oil companies had no obligation to exercise control over the manner in which their dealers disposed of waste motor oil. Unlike the defendants in *Levin Metals* and *ACETO*, the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated. In fact, while the oil companies may have encouraged their dealers to sell as much of their petroleum products as they could, the uncontroverted evidence demonstrates that they did not require their dealers to perform oil changes.

It was a matter of practice for each dealer to collect the waste oil and store it in an underground tank until it was disposed of. The fact that the oil companies leased the underground storage tanks to their dealers is not sufficient to make them liable as arrangers under CERCLA. The oil companies did not provide by contract that they would have any responsibility for the disposal of the waste oil collected by each of the dealers. As evidenced by the "independent business" language appearing in all three leases, the decision of whether or not to perform oil changes, and the manner in which the waste oil collected would be disposed of, was left entirely to the dealers.

Similarly, the oil companies' sale of virgin motor oil products to their dealers, either directly or indirectly, does not create an obligation to control the disposal of the waste motor oil. *Florida Power & Light*, 893 F.2d at 1319 (mere sale of a useable product does not create CERCLA arranger liability). Nor does the fact that the oil companies leased service stations to their dealers and required certain minimum hours of operation and imposed minimum standards of cleanliness make them liable as arrangers. To the extent that the oil companies did exercise control over certain aspects of their dealers' businesses, none of it was directed toward either the generation of or the disposal of waste oil. Thus, in the absence of a contractual provision to the contrary, the undisputed facts of this case demonstrate that the oil companies were under no obligation to arrange for the disposal of waste oil collected by their dealers.

[5] The appellant's citation to *United States v. Fleet Factors Corp.* and similar cases in support of their argument that the oil companies' alleged control over the dealers subjects them to arranger liability is unavailing. 901 F.2d 1550 (11th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Although the *Fleet Factors* court contemplated liability where the authority to control operations of a third party exists, it did so in the context of "owner or operator" liability, and not arranger liability. *Id.* at 1554–55. Owners or operators and arrangers are two distinct types of responsible parties with distinct characteristics. *Compare* 42 U.S.C. § 9607(a)(1) and (2) *with* § 9607(a)(3). The factors which make an owner or operator a responsible party do not apply with equal force in determining arranger liability.[4]

Thus, we conclude that the undisputed facts of this case demonstrate that a sufficient nexus does not exist between the

4. In fact, absent the actual exercise of management authority, courts have refused to impose liability on an entity that merely "knew about the nature of the facility's operations and had 'the power to get involved in actual management' of the facility." *Levin Metals Corp. v. Parr-Richmond Terminal Corp.*, 781 F.Supp. 1454, 1457 (N.D.Cal.1991); *see also In Re Bergsoe Metals Corp.*, 910 F.2d 668, 671–73 (9th Cir. 1990).

appellees' acts and the dealers' disposal of the waste motor oil to warrant the imposition of arranger liability on the oil companies.

C. Aider and Abetter Liability:

[6] Appellant also contends that even if the appellees are not liable as arrangers, the district court should have imposed liability on them under the common law doctrine of aider and abetter liability. We need not determine whether common law doctrines can be used to supplement CERCLA's detailed statutory scheme because the common law theory of aider and abetter liability simply does not apply to the facts of this case.

Traditionally, an individual may be subject to liability for the tortious conduct of another as an aider and abetter if he

> knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself.

Restatement (Second) of Torts, § 876(B). There is simply no evidence in this case to suggest that the oil companies knew their distributors' disposal of waste oil constituted a breach of any kind or that they gave assistance or encouragement to the distributors to so dispose of such waste. Instead, the oil companies took no part in the disposal of waste oil and there is no evidence that they had knowledge of the distributor's disposal practices. Thus, plaintiff's claim that the oil companies are liable as aiders and abetters is without merit.

CONCLUSION

Based on the undisputed facts in this case, we find that Shell, ARCO and Gulf did not have the obligation to exercise control over their dealers' waste oil disposal practices and, therefore, were not arrangers within the meaning of CERCLA, 42 U.S.C. § 9607(a)(3). Accordingly, we affirm the district court's grant of summary judgment to the defendants-appellees, Shell, Gulf and ARCO.

Philip F. VALENTI; Sara Nichols; Betty Clift; Dorothy Ferebee,

Eric Bradway; Stuart W. Kessler; Arline Lotman; Patricia W. Lord; Howard William Glassman; Sean P. Lannon; Martin Zehr; Francis Worley; Kathleen H. Gaisford; Mark Steven Kruman; Philip Berg; and Leon Akselrad, Plaintiffs–Intervenors,

v.

Brenda K. MITCHELL, Secretary of the Commonwealth of Pennsylvania; William Boehm, Commissioner, Bureau of Commissions, Elections and Legislation,

Arlen Specter, United States Senator From Pennsylvania, Defendant–Intervenor,

Betty Clift, Dorothy Ferebee and Louis Fante, Proposed Intervenor, Appellants at No. 92–1262,

Brenda K. Mitchell and William Boehm, Appellants at No. 92–1264,

Philip Valenti, Betty Clift, Dorothy Ferebee, Eric Bradway, Stuart W. Kessler, Arline Lotman, Patricia W. Lord, Howard William Glassman, Sean Lannon, Martin Zehr, Francis Worley, Kathleen Gaisford, Philip Berg, Mark Kruman and Leon Akselrad, Appellants at No. 92–1274.

Nos. 92–1262, 92–1264 and 92–1274.

United States Court of Appeals, Third Circuit.

Argued April 9, 1992.

Decided April 14, 1992.

Candidates in national election brought civil rights action for declaration that conduct of commonwealth officials in refusing

away like so much dust seriously misunderstands the conditions under which the formidable power of the federal judiciary can—and should—be invoked." *Fellhauer*, 673 F.Supp. at 1449. These considerations are certainly more substantive than the simplistic notion that procedural flaws should be overlooked merely because they are procedural.

B. Northbrook's Venue Response

[7] Defendants' position does not gain additional strength by virtue of the venue response contained in Northbrook's answer. In the state court complaint, Production included a standard venue allegation stating that venue was proper under the Wisconsin Statutes. In its answer, Northbrook "deme[d] that venue is proper under the Wisconsin Statutes as this cause was removed to the Eastern District of Wisconsin on February 3, 1993." (Northbrook's Answer at ¶ 5.) Defendants argue that this response constitutes a sufficient expression of consent under the statute. The Court disagrees. Again, the law requires Northbrook's consent to be unambiguous, and the foregoing response is a mere statement of fact that the matter was removed. It does not go further to state that Northbrook also consents to removal. If it did, removal would be proper. It is in the nature of an answer to respond to every allegation contained in the complaint, and the Court cannot attach special significance to Northbrook's denial of the venue allegation.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion to remand is granted and the case is remanded to Milwaukee County Circuit Court for further proceedings.

2. Plaintiff's motion to extend time for serving its mandatory discovery responses is denied as moot.

SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

ARROWHEAD REFINING COMPANY, et al., Defendants.

ARROWHEAD REFINING COMPANY, et al., Third-Party Plaintiffs,

v.

Rodney A. ANDERSON, et al., Third-Party Defendants.

Civ. No. 5-89-0202.

United States District Court,
D. Minnesota,
Fifth Division.

Dec. 21, 1992.

United States brought action under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against owners and operators of waste oil reprocessor, against its principal officers, and against 12 corporations seeking judgment for recovery of remedial and response costs. Defendants brought third-party action against, inter alia, seller of petroleum products. Seller moved for summary judgment. The District Court, Magnuson, J., adopting report and recommendation of McNulty, United States Magistrate Judge, held that seller was not liable for response costs generated by virtue of a company's collection of waste oil from service stations bearing seller's brand name and engaged in retail sale of seller's products.

Motion granted.

1. Health and Environment ⇐25.5(5.5)

CERCLA imposes joint and several strict liability for harm which is not indivisible between multiple actors, and once it is determined that party falls within classification of "responsible party," liability attaches without regard to fault or state of mind. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), as amended, 42 U.S.C.A. § 9607(a).

2. Federal Civil Procedure ⇐2544

To raise genuine issue of material fact, in opposition to motion for summary judgment, plaintiffs were obligated to come forward with evidentiary material stating specific facts on personal knowledge which contradicted facts stated in evidence submitted by movant.

3. Health and Environment ⇐25.5(5.5)

Term "arranged" under CERCLA statute rendering person liable for response costs if person "arranged for disposal" of hazardous substances is entitled to liberal interpretation to promote overwhelmingly remedial statutory scheme. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101, 107(a)(3), as amended, 42 U.S.C.A. §§ 9601, 9607(a)(3).

See publication Words and Phrases for other judicial constructions and definitions

4. Health and Environment ⇐25.5(5.5)

Courts will not permit party to insulate itself from liability under CERCLA by contract, but will look beyond parties' characterization of transaction to ascertain its true nature, and impose liability accordingly. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3), as amended, 42 U.S.C.A. § 9607(a)(3)

5. Health and Environment ⇐25.5(5.5)

Liability as generator of hazardous substance will not be imposed upon party whose acts or actions do not demonstrate some responsibility for decision on disposition of hazardous substance. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

6. Health and Environment ⇐25.5(5.5)

The nexus inquiry for imposition of liability for response costs test whether or not party assumed, or had obligation to assume, responsibility for a critical decision on disposal of waste product. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

7. Health and Environment ⇐25.5(5.5)

Necessary nexus for imposition of response costs is easily found in instances where party took affirmative action which resulted in deposit or treatment at site which ultimately resulted in release of hazardous substance or where party retained authority to control handling and disposition of hazardous substance and, by failing to act, in effect, decided upon disposition by negative personal involvement. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

8. Health and Environment ⇐25.5(5.5)

"Nexus," for purposes of imposition of liability for response costs, is, in common terms, merely connection between potentially responsible party and disposal of hazardous waste. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

See publication Words and Phrases for other judicial constructions and definitions

9. Health and Environment ⇐25.5(5.5)

Ownership or possession of waste product is not necessary to liability for response costs under CERCLA as a "generator." Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

See publication Words and Phrases for other judicial constructions and definitions

10. Health and Environment ⇐25.5(5.5)

In determining whether requisite nexus is present, for purpose of imposition of liability for response costs, court must engage in fact specific inquiry to determine whether action of party sought to be charged as generator of hazardous substance provides necessary connection between that party's conduct and disposal of hazardous waste. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

11. Federal Civil Procedure ⇐2470.1

Disputed fact is "material" for purposes of summary judgment if it must inevitably be resolved and if resolution may determine outcome of case under governing law.

See publication Words and Phrases for other judicial constructions and definitions

12. Federal Civil Procedure ⇐2470.1

Applicable substantive law identifies which facts are material and which are irrelevant, for purposes of summary judgment, and provides criterion for categorizing factual disputes.

13. Federal Civil Procedure ⇐2470.1

Material fact dispute is "genuine," for purposes of summary judgment, if evidence is such that reasonable jury could return verdict for nonmoving party when evidence is viewed through prism of substantive evidentiary burden.

14. Health and Environment ⇐25.5(5.5)

Seller of petroleum products was not liable for response costs as generator by virtue of a company's collection of waste oil from service stations bearing seller's brand name and engaged in retail sale of seller's products, on theory seller consented to disposition, or on theory that it had obligation to assure proper waste disposal as result of requiring dealers to perform oil changes; seller did not retain ownership of oil sold to retailers, did not control process which generated waste oil, and did not possess authority over disposal of waste oil. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3, 4), as amended, 42 U.S.C.A. § 9607(a)(3, 4).

15. Health and Environment ⇐25.5(5.5)

Purpose of CERCLA is to assess response costs on those responsible for problems caused by disposal of hazardous waste, and authority or obligation to control handling and disposal of hazardous substances is critical factor. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

16. Health and Environment ⇐25.5(5.5)

Under the CERCLA, liability attaches only to persons who actually transact in hazardous substance for purpose of treatment or disposition. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

17. Health and Environment ⇐25.5(5.5)

Generator liability under CERCLA will be imposed upon allegedly responsible person who contracts with third party to manufacture or refine product by process in which generation of hazardous substances is inherent only if it retains ownership of raw material during manufacturing or refining process and can be seen to have retained authority to control work in progress and disposition of hazardous by-product. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(3), as amended, 42 U.S.C.A. § 9607(a)(3).

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John M. Maloney, pro se.

Margaret M. Maloney, pro se.

Robert Wilson, pro se.

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Raymond J. Turcotte, pro se.

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Wayne David Struble, Marcia Marie Kull, Bowman & Brooke, Minneapolis, MN, Elizabeth Brown, Peter L. Winik, Latham & Watkins, Washington, DC, for Chrysler Corp.

ORDER

MAGNUSON, District Judge.

This matter is before the court on the defendants' and third-party plaintiffs' objections to Magistrate Judge McNulty's Report and Recommendation dated November 10, 1992 granting third party defendant Mobil's motion for summary judgment. Pursuant to statute, the court has conducted a *de novo* review of the record 28 U.S.C. § 636(b)(1)(B), Local Rule 72.1(c). Based on that review and consideration of the submis-

sions of the parties, the court adopts the Report and Recommendation.

Accordingly, **IT IS ORDERED** that:

Magistrate Judge McNulty's Report and Recommendation, dated November 10, 1992 (Clerk Docket No. 1260) is **ADOPTED**, and

Defendant Mobil Corporation's motion for summary judgment (clerk docket # 960) is **GRANTED.**

REPORT AND RECOMMENDATION

McNULTY, United States Magistrate Judge.

At Duluth, in said District, this 10th day of November, 1992

The above-titled case came before the undersigned United States Magistrate Judge, pursuant to special assignment made in accordance with provisions of Title 28 U.S.C. § 636(b)(1)(B), upon motion by Mobil Corporation, a third-party defendant, for an order granting summary judgment.

This is another in the series of dispositive motions filed by various third-party defendants. To serve the Court's convenience on review, oft-related historic facts and legal principles are reiterated.

I.

Arrowhead Refining Company formerly operated a waste oil recycling plant at which waste oil was processed and distilled to remove impurities and produce a product of desired viscosity. The waste oil was collected from storage tanks at service stations, and other sources, by Arrowhead in a tank truck. The purifying process generated waste containing hazardous substances [1] which were deposited in a swampy area adjacent to the plant. The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, authorizes the Environmental Protection Agency to take direct short-term "response" and long-term "remedial" action [2] with funds from the Hazardous Substance Response Trust (the Superfund), and to seek recovery of response and remedial costs from responsible parties. The United States brought this action against owners and operators of Arrowhead Refining Company (Arrowhead), against its principal officers, and against 12 corporations seeking judgment for recovery of remedial and response costs incurred and to be incurred at the refinery site. The statute enumerates four categories of responsible persons subject to liability for remedial and response costs. *Title 42 U.S.C. § 9607(a)* Arrowhead, and its principals, are allegedly liable as operators of the facility, and the other defendants are allegedly liable as "generators" of hazardous substances. A "generator" is:

> "(3) any person who by contract, agreement or otherwise, arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity "

Title 42 U.S.C. § 9607(a).

[1] The statute imposes joint and several strict liability for harm which is not indivisible between multiple actors, see, *United States v Parson*, 723 F.Supp. 757 (N.D.Ga. 1989); *United States v Chem-Dyne Corp.*, 572 F.Supp. 802 (D.C. Ohio 1983), and once it is determined that a party falls within the classification of a responsible party, liability attaches without regard to fault or state of mind. See, *United States v Ward*, 618 F.Supp. 884, 893 (N.C.1985). The statute further provides that a party allegedly falling within the classification of a responsible person may seek contribution from any other allegedly responsible person who is liable or potentially liable for response and remedial costs. *Title 42 U.S.C. § 9613(f)(1).* Defendants brought this third-party action against Mobil, seeking contribution to any sums which defendants may ultimately be found liable to the United States upon allegations that Mobil is liable

a. as a generator of hazardous substances. Title 42 U.S.C. § 9607(a)(3) and

1. For purposes of this motion, the content of the waste material is assumed to include a hazardous substance

2. Defined in Title 42 U.S.C. § 9601(23), (24) and (25)

the Minnesota Environmental Response and Liability Act (MERLA) Minn.Stats. § 115B.03 subd. 1(b);

b. as a transporter of hazardous substances. Title 42 U.S.C. § 9607(a)(4) and Minn.Stats. § 115B.03 subd. 1(c);

c. under the common law of contribution; and

d. under a theory of unjust enrichment.

Plaintiff has submitted no evidence whatsoever which indicates that Mobil was a responsible person as a transporter of hazardous substances as defined in Title 42 U.S.C. § 9607(a)(4), and concede that liability on any pendant state law claim is dependent upon liability under CERCLA. Our focus, therefore, is upon the claim that Mobil is a responsible party as a generator of hazardous substances, we commence by briefly reviewing our function under Rule 56

II.

The mechanics of a motion for entry of summary judgment are clear and simple. Movant must come forth with evidence in the form of affidavits, pleadings, deposition testimony, answers to interrogatories or admissions which demonstrate that no genuine issue of material fact exists. *Rule 56(c), Federal Rules of Civil Procedure; Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). Once the movant's burden is properly supported, the burden of going forward shifts to the nonmoving party who must come forth with evidence in similar form which designates specific facts demonstrating that a genuine issue of material fact exists. See, *Celotex Corp v. Catrett*, supra at 324, 106 S.Ct. at 2553 (1986); *Matsushita Elec. Indus Co v Zenith Radio Corp.*, 475 U.S. 574, 585–86, 106 S.Ct. 1348, 1355–56, 89 L.Ed.2d 538 (1986). The evidence need not be in a form admissible at trial, but it must be more than colorable and must be significantly probative. *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam); *First Nat'l. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968), reh'g. den., 393 U.S. 901, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968). The applicable substantive law identifies material facts, and the crux of our inquiry is whether the evidence presents sufficient disagreement over a material fact to require resolution by a trier of fact, or whether it is so one-sided that one party must prevail as a matter of law when all reasonable inferences are drawn in favor of the non-moving party. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247–52, 106 S.Ct. 2505, 2509–12, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus Co. v. Zenith Radio Corp.*, supra.

III.

Mobil is in the business of selling petroleum products, and, during the relevant time period, approximately June, 1961 to December, 1976, Mobil products were retailed by service stations bearing the Mobil brand name. The usual practice was for Mobil to own or lease the service station and equipment, which it, in turn, leased or subleased to individuals who operated the businesses as independent entrepreneurs. The leased facility included underground tanks in which to temporarily store used oil removed from customer's automobiles prior to permanent disposal. Arrowhead allegedly scavenged waste oil from storage tanks of about 30 service stations which were operated under leases with Mobil.[3] Third-party plaintiffs seek to impress generator status on Mobil by virtue of Arrowhead's collection of waste oil from the service stations bearing the Mobil brand name and engaged in the retail sale of Mobil products.

In support of this motion, Mobil has presented affidavits from individuals employed as Area or District Managers for periods covering 1959 to 1984. These affidavits, based upon affiant's personal knowledge of Mobil's relationship with all service stations in this area, aver that:

Mobil did not own or operate any of the service stations identified as sources of hazardous substances transported to the Arrowhead site;[4]

Mobil did not own waste or drain oil;

3. The operators have also been joined as third-party defendants

4. This averment is conceded to be fact by third-party plaintiffs

Mobil did not arrange for treatment or disposition of waste or drain oil by arrowhead;

Mobil did not select Arrowhead as a facility for disposal or treatment of waste or drain oil; and

Mobil did not control, direct or otherwise decide how any service station operator would dispose of or treat any of the drain or waste oil at the Arrowhead site or any other facility.

In opposition to the motion, and to sustain the burden of going forward with evidence to establish a genuine issue of material fact, third-party plaintiffs submit two affidavits and an individual third-party defendant's Answers to Interrogatories

An affidavit by Loren Bruce, Jr. avers that:

He leased a service station and equipment from Mobil from 1968 to 1975;

Mobil provided him with support and products required in the business, he sold only Mobil products, and Mobil offered incentives for lessees to buy larger quantities of oil from Mobil;

Mobil required him to perform oil changes at the service station; and

Ray Frazee, a Mobil representative, consented to having Arrowhead pick up used drain oil from his station.

An affidavit by Clarence E. Dzuck avers that:

He leased a service station from Mobil during 1958 and 1959; [5]

He sold only petroleum products purchased from Mobil;

He never personally called or contacted Arrowhead or anyone else to pick up used drain oil,

Mobil *may* have made arrangements for waste oil pick up; [6]

If Arrowhead picked up used drain oil from his station, he is without knowledge of who initiated this arrangement,

Mobil *expected* him to perform all normal service station functions including changing oil.[7]

In Answers to Interrogatories, Evert Pearson, who operated a leased Mobil station from 1955 to February, 1962, avers that:

He never made arrangements for removal of waste oil from the station, and that, as far as he knows, none was ever removed;

He *feels* that if any arrangement for removal of drain oil was made, Mobil would have been responsible for them. [Emphasis added]

IV.

[2] The evidence in opposition to this motion presented by Dzuck's affidavit and Pearson's Answers to Interrogatories is not sufficient to raise a genuine issue of material fact in regard to whether or not Mobil entered into an arrangement, by contract or otherwise, with Arrowhead. Dzuck's affidavit is of questionable relevance, but, in any event, merely states that Mobil *may* have arranged for a pick up of drain oil. Pearson's Answers to Interrogatories state that, as far as he knows, no drain oil was removed from his station, but that, if it was, he made no arrangement for removal, and, if one was made, Mobil would have made it. To raise a genuine issue of material fact, third-party plaintiffs were obligated to come forth with evidentiary material stating specific facts on personal knowledge which contradicts facts stated in evidence submitted by movant. *Lujan v National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), *Williams v. Borough of West Chester*, 891 F.2d 458 (3d Cir.1989) (Garth, J., concurring); *United States v. Monsanto Co.*, 858 F.2d 160, 170–71, n. 20 (4th Cir.1988), cert. den., 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). Neither of these lessees state material facts of their personal knowledge. They merely relate what they surmise. (Save for Pearson's averment that, to his knowledge, Arrowhead never collected used oil from his station, which creates an

5. The time period with which this litigation is concerned commences in June, 1961. Affiant's experience or knowledge of events prior to that time is of doubtful relevance.

6. Emphasis is added to facilitate later reference.

7. Ibid.

interesting paradox.) The determination of whether or not third-party plaintiffs have demonstrated existence of a genuine issue of material fact regarding Mobil's status as a generator of hazardous substances depends upon the averments of facts made by Loren Bruce.

V.

[3] The word "arranged" as used in Section 9607(a)(3) in the phrase "any person who . , or otherwise, arranged for disposal .. of hazardous substances owned or possessed by such person, or any other party or entity" is cryptically vague and undefined.[8] To promote the overwhelmingly remedial statutory scheme, however, courts have granted the word and the phrase a very liberal interpretation, see, *United States v Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 733 (8th Cir.1986), cert. den., 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v Aceto Agr. Chems. Corp.*, 872 F.2d 1373 (8th Cir.1989), reh'g. den., (1989); *Dedham Water Co v Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.1985), and the Eighth Circuit has found it advisable to interpret the phrase in the light of CERCLA's two essential purposes, i.e.:

1. To provide immediate tools for prompt and efficient response to problems resulting from hazardous waste disposal, and
2. To assess costs and responsibility for remedying harmful conditions on those responsible for problems caused by disposal of hazardous substances.

See, *Northeastern Pharmaceutical & Chem. Co.*, supra.

[4] Recognizing that the remedial statute is directed towards imposing liability upon those causing the harm which is to be remedied, courts will not permit a party to insulate itself from liability by contract, but will look beyond the parties' characterization of the transaction to ascertain its true nature, and impose liability accordingly, cf., *United States v. Aceto Agr. Chems. Corp.*, supra; *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir.1990); *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 192 (W.D.Mo.1985); *United States v. Ward*, supra; *State of Missouri v. Independent Petrochemical Corp.*, 610 F.Supp. 4 (E.D.Mo.1985); *United States v Wade*, 577 F.Supp. 1326, 1333 n. 3 (E.D.Pa. 1983). Consequently, liability as a generator of a hazardous substance has been imposed upon a party who sells or delivers a product containing a hazardous substance to a second party, who, in turn, disposes of the hazardous substance, where the first party retains an ownership interest, or authority to control disposal; or where common law would impose vicarious liability for the abnormally dangerous act of the second party; or where hazardous waste is generated, and is disposed of, in the course of a process performed by the second party for the first party's benefit. See, e.g., *United States v Aceto Agr Chems. Corp.*, supra at 1380–82; *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F.Supp. 1448 (N.D.Cal.1991)

[5, 6] By the same token, liability as a generator of a hazardous substance will not be imposed upon a party whose acts or actions do not demonstrate some responsibility for the decision on disposition of a hazardous substance. Cf., *United States v Aceto Agr Chems Corp.*, supra; *Florida Power & Light Co. v Allis Chalmers Corp.*, supra; *CPC Int'l. Inc v. Aerojet-General Corp.*, 731 F.Supp. 783 (W.D.Mich.1989); *Edward Hines Lumber Co. v Vulcan Materials Co.*, 685 F.Supp. 651 (N.D.Ill.1988), aff'd., 861 F.2d 155 (7th Cir.1988), reh'g. den., (1988); *United States v. A & F Materials Co., Inc.*, 582 F.Supp. 842 (S.D.Ill.1984). This connection is referred to as nexus, and the pertinent nexus inquiry tests whether or not the party assumed, or had the obligation to assume, responsibility for the critical decision on disposal of the waste product. Cf., *Northeastern Pharmaceutical & Chem Co.*, supra at 743; *CPC Int'l. Inc. v. Aerojet-General*

8. In contrast, hazardous substance, facility, treatment, disposal and other terms are specifically defined See, *Title 42 U S C § 9601*

Corp., 759 F.Supp. 1269, 1278 (W.D.Mich. 1991).

[7, 8] The necessary nexus is easily found in instances where a party took affirmative action which resulted in deposit or treatment at a site which ultimately resulted in release of the hazardous substance, cf., *United States v Consolidated Rail Corp.*, 729 F.Supp. 1461, 1472 (E.D.Del.1990), or where the party retained the authority to control the handling and disposition of a hazardous substance and, by failing to act, in effect, decided upon the disposition by negative personal involvement. Cf., *Northeastern Pharmaceutical & Chem Co*, supra at 743; *Allied Towing v Great Eastern Petroleum Corp.*, 642 F.Supp. 1339, 1350 (E.D.Va.1986); *United States v A & F Materials Co.*, supra at 845. Other circumstances require analysis of basic concepts. Nexus is, in common terms, merely a connection between the potentially responsible party and the disposal of the hazardous waste. Cf., *Jones-Hamilton v Beazer Materials & Services*, 959 F.2d 126 (9th Cir.1992); *United States v Aceto Agr. Chems. Corp.*, supra; *Levin Metals v. Parr-Richmond Terminal Co.*, supra; *Hassayampa Steering Committee v State of Ariz.*, 768 F.Supp. 697 (D.Ariz. 1991). Nexus, therefore, must be predicated upon the parties' conduct with respect to disposal of the hazardous waste.

[9, 10] The numerous published cases clearly indicate that in each instance the court must engage in a fact specific inquiry to determine whether or not the action of the party sought to be charged as a generator of a hazardous substance provides the necessary connection between that party's conduct and the disposal of hazardous waste,[9] but guidance pertaining to pertinence of particular facts is provided by a recent Second Circuit case which posed facts remarkably similar to the facts in this case. See, *General Elec. Co. v. AAMCO Transmissions, Inc*, 962 F.2d 281 (2d Cir.1992). *AAMCO* was aftermath to a CERCLA response recovery action brought against H. Eugene Wray, General Electric and other defendants. Wray operated a waste oil business, and, in the course of that business, collected used oil from General Electric, several other major corporations, and several hundred automobile dealerships, garages and service stations. The waste oil was transported by Wray to a site located in a fresh water wetlands. After leakage occurred, a CERCLA action was commenced, and the action was settled by entry of a Consent Judgment which specifically permitted General Electric to pursue contribution actions against potential responsible parties who had not participated in the Consent Judgment. General Electric commenced action against 30 service stations, and against three major oil companies which had leased service station facilities and sold petroleum products to the service station defendants. A motion for summary judgment by the major oil companies was granted, and General Electric appealed. General Electric's major contention was that the phrase "otherwise arranged" should be interpreted to include entities that had the ability or authority to control waste disposal practices of a third-party, even if they did not take part in the decision of how, when or where the disposal would be effected.

The Court rejected the proposition that mere economic bargaining power which would permit one party to impose certain terms and conditions on another will, in and of itself, create an obligation which will constitute that party a generator or arranger. The Court analyzed the statute, and concluded that:

> " , Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the obligation to

9. A court should not be misled by cases which indicate that ownership or possession of the waste product is necessary to liability as a generator See, e g , *State of New York v City of Johnstown*, 701 F Supp 33 (N D N Y 1988), *C Greene Equip Corp v Electron Corp*, 697 F.Supp 983 (N D Ill 1988), *United States v Ward*, 618 F Supp 884 (E D N.C 1985) The narrow limitation of generator liability to an owner or possessor of the waste product is contrary to the language of the statute, cannot be reconciled with cases which emphasize that the decisionmaking process as critical, and has been rejected by the Eighth Circuit See, *United States v Aceto Agr Chems Corp*, 872 F 2d 1373 (8th Cir 1989), also see, *United States v Northeastern Pharmaceutical & Chem Co*, 810 F 2d 726 (8th Cir 1986), cert den , 484 U S 848, 108 S Ct 146, 98 L Ed.2d 102 (1987), *United States v Bliss*, 667 F Supp 1298 (E D Mo 1987)

exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision."

The Court found that the oil companies exercised control over aspects of the dealer's businesses, but that no control was exercised over generation or disposal of waste oil; that the oil companies did not own the waste oil nor control the process by which it was generated; that leasing underground storage tanks for waste oil was insufficient to constitute oil companies arrangers; that the dealers were independent businessmen; that the oil companies did not assume responsibility for disposal of waste oil by contract; that sale of new oil to the dealers did not create an obligation to control disposition of waste oil; and that

"In fact, while the oil companies may have encouraged their dealers to sell as much of their petroleum products as they could, the uncontroverted evidence demonstrates that they did not require their dealers to perform oil changes." [10]

These subordinate findings lead to an ultimate finding that, in the absence of a contractual provision, the oil companies were under no obligation to arrange for proper disposal of waste oil collected by dealers, to the conclusion that the oil companies were not "arrangers" within the meaning of Section 9607(a)(3); and to affirmance of the grant of summary judgment.

VI.

This Court's fact specific inquiry is hampered by the peculiar posture of the evidence or lack of evidence. We glean from submissions and admissions that the station operators were independent businessmen who leased real estate and equipment from Mobil, and that each lessee conducted its business independently, subject to terms of the lease which required it to deal exclusively in Mobil products and to comply with minimum standards of cleanliness, hours of operation and similar business practices. The evidence indicates that the relationship between Mobil and its lessees was fundamentally the same as the relationship between oil companies and dealers in *AAMCO*, with one exception. Loren Bruce, one of the lessees, avers, by affidavit, that:

1. A Mobil representative consented to Arrowhead collecting used oil from his station, and
2. Mobil required him to perform oil changes.

We must determine whether or not the two averments are sufficient to determinatively distinguish ARMCO on its facts, and whether or not they are sufficient to raise a genuine issue of material fact which forecloses entry of summary judgment.

[11–13] A disputed fact is material if it must inevitably be resolved and if the resolution may determine the outcome of the case under governing law. See, *Angel v. Seattle First Nat'l. Bank*, 653 F.2d 1293 (9th Cir. 1981). Applicable substantive law identifies which facts are material and which are irrelevant, and provides the criterion for categorizing factual disputes. *Anderson v Liberty Lobby, Inc.*, supra. A material fact dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party when the evidence is viewed through the prism of the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, supra, 477 U.S. at 248 and 254, 106 S.Ct. at 2510 and 2513.

VII.

[14] The first averment is obviously directed towards a showing that Mobil was actively involved in the disposition of waste oil through Arrowhead. In analyzing its meaning and probative value, we must recognize that the word "consent" is imprecise and has broad and diverse connotations. Understanding the context in which the "consent" was given and the precise words used to signify consent is imperative. The phraseology of the averment expresses "consent" as a conclusion. As it stands, it is insufficient to denote active participation by Mobil in the decision to utilize Arrowhead for waste oil disposal. Reasonably construed it merely imputes knowledge of this lessee's decision to

10. This statement has troublesome aspects and is set out verbatim to facilitate discussion

Mobil, and establishes that Mobil, with that knowledge, did not interfere with the decision. Mobil did not own the waste oil, did not control the process which generated waste oil, and there is no showing that it possessed contractual power to dictate the manner of disposition of waste oil. The averment does not tend to establish acts or actions which demonstrate responsibility, or assumption of responsibility, for the critical decision. Without more, a naked conclusory averment of "consent" to a particular disposition of waste oil does not raise a material issue of fact.

Even if the averment is seen to raise an issue of material fact, it does not raise a genuine issue. Mobil, through affidavits of three qualified persons with personal knowledge, has denied that it possessed control, or directed or decided on means of disposition of waste oil. Third-party plaintiffs have the burden of proving otherwise by a preponderance of the evidence The averment that Mobil's representative consented to disposition of waste oil through Arrowhead is not sufficiently probative to outweigh other contrary evidence and prove that Mobil actively or passively participated in the decision Mobil would be entitled to a directed verdict on the issue.

VIII.

The second averment is more troublesome. This averment is probably directed towards showing that Mobil was impressed with an obligation to assure proper disposal of waste oil, and that this obligation provides nexus necessary to impose generator liability on Mobil.

Mobil has remained silent on the question of whether or not it required all dealers to perform oil changes, but Mobil was under no obligation to negate that claim, if that claim is actually made. Third-party plaintiffs seek to establish that Mobil is a responsible party for waste oil generated by 30–odd stations. If third-party plaintiffs claim that all of Mobil's lessees were required to perform oil changes, and that this is a determinative factor in distinguishing *AAMCO* and establishing nexus, third-party plaintiffs were obligated to produce evidence from which such a universal requirement can, at least, be inferred. They have not. Only one of the three lessees upon whom they rely makes the claim, and it is reasonable to presume that had the other two been subject to the same requirement they would have echoed the claim. It is not reasonable to infer from the evidence presented that all lessees were required to perform oil changes. This Court concludes that the rationale and holding of *AAMCO* controls disposition of the summary judgment motion for all claims save the one based upon disposal of waste oil from the station operated by Loren Bruce.

That aside, we still must meet the issue head-on, and again refer to the rationale and holding in *AAMCO*. We cannot determine with absolute certainty whether or not the *AAMCO* Court considered the absence of a requirement that dealers perform oil changes to be the determinative factor which would outweigh all other factors of the lessor-lessee relationship which it considered. In other words, can we say that the Court, by implication, held that an oil company which required its service station dealers to change oil was automatically impressed with an obligation to exercise control over disposal of waste oil thereby produced, as a matter of law? This Court thinks not. The *AAMCO* Court carefully focused on the narrow question of whether or not the relationship between dealers and the oil companies impressed an obligation on the oil companies to control disposition of waste oil. In doing so, it considered all facets of the relationships between oil companies and dealers, and weighed each factor and their synergistic effect. The sole reference to the absence of a requirement that dealers perform oil changes is the terse afterthought in the context quoted, which, when read in conjunction with the statement that " in the absence of a contractual provision to the contrary, the . oil companies were under no obligation to arrange for disposal of waste oil ", gives no credence to a presumption that presence of the requirement would have provided the missing contractual provision and precipitated a different decision.

The full thrust of the rationale of the *AAMCO* Court is illuminated by its reference

to cases holding that, absent actual exercise of management authority, liability will not be imposed upon an entity which merely knew about the nature of a disposal facility's operation and had power to become involved in management of the facility; [11] and the statement that "the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another does not itself create an obligation under CERCLA." It seems fairly clear that the Court did not consider the mere power, authority or ability to control disposition of a hazardous substance sufficient to impose an obligation to exercise control, and that an obligation sufficient to constitute nexus would have to find roots in contract or other legally cognizable source.

Mobil leased service station facilities and equipment to independent businessmen, and sold useable petroleum products to the lessees. In part, the relationship between Mobil and the lessees was that of seller and purchaser of usable non-hazardous products. When put to intended use by the purchaser, the products generated hazardous substances which were within the disposal regulation of CERCLA, but, in no way, can the sale be interpreted as a sale for the purpose of ridding Mobil of hazardous substances. CERCLA liability as a generator cannot be imposed upon Mobil on the basis of this seller-purchaser relationship. Cf., *Florida Power & Light Co. v. Allis Chalmers Corp.*, supra; *Prudential Ins. Co. of America v. U.S. Gypsum*, 711 F.Supp. 1244 (D.N.J.1989).

In part, the relationship was that of landlord-tenant. The lease imposed contractual obligations upon both parties and, to an extent, governed aspects of the lessee's business operation. The lessee was obliged to comply with requirements pertaining to business practices imposed by the lease, and we will assume, arguendo, that included a requirement that oil change service be offered to the public. In all respects not specifically regulated by the lease, the lessee was free to independently operate the service station business without interference by Mobil. The generation of waste oil containing hazardous substances is inherent in the operation of a full service automobile service station, and, it follows, that disposal of waste oil generated is a fundamental and inescapable function of the operation. The terms of the lease carved spheres of the operation in which Mobil retained a voice, but none of the control over the service station business practices was concerned with waste oil disposal, an essential part of the business. It is logical to conclude that waste oil disposal was a facet of the service station operation which was exclusively within the domain of the lessee, and that we cannot find, as a matter of fact, that the contract, or an extra-contractual relationship, imposed an obligation upon Mobil to control and direct the manner of disposition of waste oil.

Can we conclude that a mere requirement that lessees perform oil changes impressed an obligation on Mobil to control and direct the manner of disposition of waste oil as a matter of law? This Court thinks not. If such obligation is imposed upon Mobil, it will also be necessary to conclude that the requirement imposed a concomitant obligation upon the lessee to submit to dictates or directions of Mobil pertaining to disposition of waste oil. Without this binding, reciprocal obligation, the obligation imposed upon Mobil would not be enforceable against the lessee The obligation would impute power in lessor to direct and control disposition of waste oil by the lessee, but the power would be substantively empty and basically illusory. This Court finds no authority which authorizes a drastic rescripting of the lease to impose these obligations on the parties, or any merit in judicially constructing a dichotomy.

[15–17] We must bear in mind that the purpose of CERCLA is to assess response costs on those responsible for problems caused by disposal of hazardous waste, and that the authority or obligation to control handling and disposal of hazardous substances is the critical factor. *United States v. Northeastern Pharmaceutical & Chem Co.*, supra; *United States v Consolidated Rail Corp.*, supra. Liability attaches only to persons who actually transact in a hazardous substance for the purpose of treatment or

11. Citing, *Levin Metals Corp v Parr-Richmond Terminal Corp*, 781 F Supp 1454 (N D Cal 1991)

disposition. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, supra; *United States v Pesses*, 794 F.Supp. 151 (W.D.Pa.1992). Mobil did not transact in a hazardous substance, but in virgin motor oil, which is excluded from the definition of hazardous substances. See, *Title 42 U.S.C. § 9601(14)*. The hazardous substance was acquired by the service station when used oil was drained from a customer's car. Rough analogy can be drawn to instances in which an allegedly responsible person contracts with a third-party to manufacture or refine a product by a process in which the generation of a hazardous substance is inherent. Generator liability will be imposed upon the allegedly responsible person only if it retains ownership of the raw material during the manufacturing or refining process and can be seen to have retained authority to control work in progress and disposition of the hazardous by-product. Cf., *United States v. Aceto Agr. Chems Corp*, supra; *Levin Metals Corp v Parr-Richmond Terminal Co.*, supra. Here, new oil sold by Mobil, which was not a hazardous substance, replaced old oil, which may or may not have been originally sold by Mobil and which was a hazardous substance. Naturally, the retail sale of its petroleum products benefits Mobil if the retailer restocks his supply with Mobil products, but oil changes performed in the ordinary course of business primarily benefit the service station which controls the transaction and assumes ownership, or custodial possession, of the waste oil by-product. Mobil did not retain ownership of the virgin oil sold to the retailer, control the oil change process, or possess authority over disposal of the waste oil. From whence would an obligation to control deposit of used motor oil flow?

It would be nice to utilize the concept of nexus to invade the deep pockets of a major oil company and thereby conserve the Superfund, but generator liability is not composed of a series of links in an endless chain. Liability ends with the person who made the decision on disposal, or, by virtue of ownership or control, was obligated to make the decision. Nexus must be premised upon the conduct of the party in respect to the disposal of hazardous waste. Extending the nexus concept to include a party which leases a service station and sells a product intended for use in that service station that generates a hazardous substance, but which does not possess power, or exert influence, to control disposition of the hazardous substance, skews the concept of nexus beyond recognition.

WHEREFORE, It is—

RECOMMENDED:

That the Court enter an Order granting Mobil Corporation summary judgment, and directing the Clerk of the Court to enter Judgment accordingly.

RESOLUTION TRUST CORPORATION, as receiver of Missouri Savings Association, F.A., Plaintiff,

v.

Solon GERSHMAN, et al., Defendants.

No. 4:92CV1687.

United States District Court,
E.D Missouri, E.D.

July 12, 1993.

Resolution Trust Corporation (RTC), as receiver for failed savings institution, sued former directors and officers for breach of fiduciary duty, negligence and gross negligence and sought accounting of officers' and directors' financial circumstances for past five years. Defendants moved to dismiss and for more definite statement. The District Court, Hamilton, J., held that: (1) provision of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) that director or officer may be personally liable for gross negligence did not preempt RTC's state law claims for breach of fiduciary duty and negligence; (2) "other applicable law," within meaning of provision of FIRREA that director or officer may be held personally liable for gross negligence but that nothing

for lack of personal jurisdiction is hereby ALLOWED.

An Order will issue

U.S. v. ARROWHEAD REFINING CO.

U.S. District Court
District of Minnesota

UNITED STATES OF AMERICA, Plaintiff, vs. ARROWHEAD REFINING COMPANY, ET AL., Defendants, and ARROWHEAD REFINING COMPANY, ET AL., Third-Party Plaintiffs, vs PLAZA DODGE, INC., Third-Party Defendant and Fourth-Party Plaintiff, vs. CHRYSLER CORPORATION, Fourth-Party Defendant, No 5-89-202, March 12, 1993

Comprehensive Environmental Response, Compensation, and Liability Act

Liability — Generators/sellers (▶170.2520)

Settlement and contribution — Contribution among responsible parties (▶170.4020)

[1] Automobile manufacturer is not liable under Comprehensive Environmental Response, Compensation, and Liability Act for generating waste oils sent to used oil refining facility, because (1) even though automobile dealer claimed that manufacturer could be held liable under act for arranging for disposal of waste oil from dealer that contributed to contamination at facility, court finds neither manufacturer nor its employees exercised sufficient control over dealer's waste oil disposal decisions to give rise to liability under act, and (2) court similarly finds that manufacturer exercised insufficient control over dealer to support piercing corporate veil to hold manufacturer liable for dealer's actions.

After review by federal district court of ruling (McNulty, Mag.) that recommended motion for summary judgment be granted in favor of automobile manufacturer on fourth-party claims raised in Comprehensive Environmental Response, Compensation, and Liability Act suit, ruling adopted and motion granted. Prior opinion: 35 ERC 2065.

Rolf A. Lindberg, Duluth, Minn., for Plaza Dodge Inc.

Peter L. Winik, Wash., D.C., and Marcia M. Kull, Minneapolis, Minn., for Chrysler Corp.

Before Paul A. Magnuson, district judge.

Full Text of Order

Based upon the Report and Recommendation of United States Magistrate Judge Patrick J. McNulty, and after an independent review of the files, records and proceedings in the above-titled matter, it is —

ORDERED.

That the motion of Chrysler Corporation for summary judgment shall be, and hereby is, granted, and the Clerk of the Court is directed to enter judgment accordingly.

Full Text of Magistrate's Report and Recommendation

The above-titled case came before the undersigned United States Magistrate Judge, pursuant to special assignment made in accordance with provisions of Title 28 U.S.C. 636(b)(1)(B), upon motion by Chrysler Corporation, Fourth-Party Defendant, for an order granting summary judgment Chrysler Corporation appears by Peter L. Winik, Esq. of Luthan & Watkins and by Marcia M. Kull, Esq. of Bowman and Brooke. Plaza Dodge, Inc., Fourth-Party Plaintiff, appears by Rolf A. Lindberg, Esq. of Fryberger, Buchanan, Smith & Frederick

The responding party did not file an affidavit indicating that further discovery was necessary to enable it to establish facts essential to justify opposition to this motion, see, *Rule 56(f), Federal Rules of Civil Procedure*, but, at the hearing, indicated that Answers to Interrogatories, which were not yet due, were necessary. This Court, therefore, withheld action on this motion until Answers were served, and afforded the parties additional time to submit Supplemental Memoranda. This has been accomplished, and the motion is ripe for determination.

The action arises out of the operation of Arrowhead Refining Company which formerly operated an oil recycling plant at which waste oil and other used petroleum products were processed and distilled to remove impurities and produce a product of desired viscosity. The waste oil was collected from storage tanks at service stations, and other sources, by an Arrowhead tank truck The purifying process generated waste-containing hazardous substances [1] which were deposited in a swampy area adjacent to the plant. The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, authorizes the Environmental Protection Agency to take direct short-term "response" and long-term "remedial" action [2] with funds from the Hazardous Substance Response Trust (the Superfund), and to seek recovery of these response and remedial costs from responsible parties. The United States brought this action against owners and operators of Arrowhead Refining Company (Arrowhead), against its principal officers, and against 12 corporations seeking judgment for recovery of remedial and response costs incurred and to be incurred at the Arrowhead refinery site. The statute enumerates four categories of responsible persons subject to liability for remedial and response costs. *Title 42 U.S.C. §9607(a)*. Arrowhead, and its principals, are allegedly liable as operators of the facility, and the other defendants are allegedly liable as "generators" of hazardous substances. A "generator" is:

> "(3) any person who by contract, agreement or otherwise, arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity . . ."

Title 42 U S C §9607(a)

The statute imposes joint and several strict liability for harm which is not divisible between multiple actors. See, *United States v Parsons*, 723 F.Supp. 757 [30 ERC 1160] (Ga. 1989); *United States v Chem-Dyne Corp*, 572 F.Supp. 802 [19 ERC 1953] (Ohio 1983). Once it is determined that a party falls within the classification of a responsible party, liability attaches without regard to fault or state of mind. See, *United States v. Ward*, 618 F.Supp. 884, 893 [23 ERC 1391] (N.C. 1985). The statute further provides that an allegedly responsible person from whom recovery is sought may seek contribution from any other allegedly responsible person who is liable or potentially liable for response and remedial costs. *Title 42 U.S.C. §9613(f)(1)*. Defendants brought a third-party action against Plaza Dodge, Inc. alleging that Plaza Dodge, Inc. is a potentially responsible person as a generator of hazardous substances, and seek judgment for contribution to any sums which defendants may ultimately be found liable to the United States Plaza Dodge, Inc., in turn, impleaded Chrysler Corporation, as a Fourth-Party Defendant, alleging that Chrysler is a Potentially responsible person as a generator of hazardous substances released at the Arrowhead Site seeking contribution to any sums which it may be found liable to Third-Party Plaintiffs, and for other relief.[3]

Succinctly stated, movant's contention is that Plaza Dodge, Inc., a Chrysler dealer, was a separate independent legal entity that managed and operated an automobile dealership which arranged for disposition of waste oil at the Arrowhead Site; that Chrysler Corporation was not actively involved, or obligated to be involved, in the dealer's waste oil disposal, and that there is no nexus between the disposal of waste oil by Plaza Dodge, Inc. and Chrysler Corporation upon which to predicate generator liability

II

[1] Plaza Dodge, Inc. was organized and operated as a "Dealer Enterprise" or "Marketing Investment" dealership.[4] A Marketing Investment dealership (M.I.)

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[1] For purposes of this motion, the content of the waste material is assumed to include a hazardous substance.

[2] Defined in Title 42 U S.C. §9601(23) (24) and (25).

[3] Claims predicated upon the Minnesota Environmental Response and Liability Act, *Minn. Stats., §115B.03, subd 1*, upon the common-law of contribution, and upon an unjust enrichment theory are advanced in the Third and Fourth-Party Complaints, but it is generally conceded that the resolution of CERCLA claims will govern the final disposition of all actions. Independent consideration of the alternative claims is deemed unnecessary

[4] During the course of relevant events, the nomenclature used by Chrysler to describe the enterprise changed, but this is of no import.

is one in which Chrysler provides the initial investment for a selected dealer who is, in turn, granted the right to retire Chrysler's interest through profits generated by the dealership

The relevant material historic facts necessary to understand the rights and obligations of the parties involved in the Plaza Dodge M.I. dealership are documented and are undisputed.

On February 20, 1963, Plaza Dodge, Inc. was incorporated by Chrysler in the State of Delaware as a wholly owned subsidiary. The incorporators were three attorneys employed in the Chrysler legal department They served as the first Board of Directors The corporation was authorized to issue 1,000 shares of Preferred Stock and 1,000 shares of Common Stock, both with $100 par value Preferred Stock has voting rights and was entitled to payment of dividends from accumulated earnings of the corporation in accordance with a rather complicated formula, but Common Stock was entitled to no dividends and had no voting rights while any shares of Preferred Stock were outstanding.

At the First Meeting of the Board of Directors, February 20, 1963, the Board accepted subscriptions by Chrysler for 675 shares of Preferred and 225 shares of Common Stock, and, in consideration for payment of $90,000, the 900 shares of capital stock were issued to Chrysler The incorporators tendered resignations from the Board of Directors, which were accepted Three other Chrysler employees were elected to serve as the Board,[5] and the five corporate officers elected were all Chrysler employees.[6]

On March 12, 1963, pursuant to a Management Agreement later discussed, George Constance became the President and a Director of the Corporation. Constance occupied those offices until his death in July, 1976 Until October, 1974, when Constance completed purchase of all outstanding shares of capital stock, the other two Directors, the Vice President, the Assistant Secretary and the Assistant Treasurer were always Chrysler employees, and for brief periods in 1963 and 1965, the Secretary/Treasurer was also a Chrysler employee

During the same time frame in 1963, Plaza Dodge subleased an automobile sales and service facility from Chrysler In 1965, Chrysler purchased another facility and the Plaza Dodge dealership was relocated. The landlord-tenant relationship was not affected and subsisted throughout the relevant time frame In and of itself, the landlord-tenant relationship cannot form a basis for imposing generator liability on Chrysler, and is of only tangential import.

On March 12, 1963, Chrysler, Plaza Dodge and George W. Constance entered into a Management Agreement which established terms and conditions under which Constance would manage and conduct the affairs of the dealership, and terms and conditions under which he could invest in the dealership corporation and operate the dealership under Chrysler's Dealer Enterprise Plan. The Agreement afforded Constance the opportunity to retire Chrysler's investment by stock purchases and thereby become the corporation's sole stockholder. . The Agreement provided for election of Constance as President and as a Director of Plaza Dodge and for his employment as Manager This employment as manager was at will Constance was subject to removal as manager by the Board of Directors and to removal as an officer and Board member by Chrysler, the sole voting stockholder The Agreement also provided for establishment of an escrow account into which Constance was to make an initial deposit of $4,000, and into which he was to thereafter annually deposit at least one-half of any bonus received. The escrow fund was first to be used for purchase by Constance of the 225 shares of Common Stock from Chrysler, at par, and, if funds became available, to later purchase the 675 shares of Preferred Stock, at par plus all accrued dividends Any shares of Preferred Stock purchased would be immediately exchanged for unissued shares of Common Stock, share for share. The stock purchased by Constance under the plan was "lettered" (it could not be assigned, sold, pledged or transferred) and, if Chrysler required it, each certificate would be endorsed in blank and deposited with and held by an escrow agent (which could be Chrysler) until, among other things, certification that all shares of Preferred Stock had been redeemed and retired.

Pursuant to this plan, Constance purchased capital stock from Chrysler, and the records reflect the change in stock

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[5] Various Chrysler employees occupied two of the three seats on the Board of Directors at all times until October 1, 1974

[6] President and General Manager, Vice President, Secretary/Treasurer, Assistant Secretary and Assistant Treasurer

ownership in Plaza Dodge over a 10 year period

Dates	Chrysler	Constance
1963	100%	0%
1/1/67	75%	25%
1/1/70	68.3%	31.7%
1/1/71	64%	36%
1/1/72	56.4%	43.6%
7/1/74	0%	100%

On March 28, 1963, Plaza Dodge, Inc and Chrysler Motors Corporation entered into a Direct Dealer Agreement [7] The Agreement is intended to provide a means for sale and service of Dodge motor vehicles, parts and accessories. The Agreement grants the dealer a non-exclusive right to purchase Dodge motor vehicles, parts and accessories for resale at retail in a stated geographic area, and specifically states that Dodge entered into the Agreement in reliance upon active, substantial and continuing personal participation in management of the dealership by George Constance

A separate Agreement, titled Dodge Direct Dealer Agreement Terms and Provisions, is incorporated into the Direct Dealer Agreement by reference. This Agreement rather comprehensively sets forth the rights and obligations of the parties Among other things, it requires the dealer to sell at least the minimum number of vehicles which Dodge will annually determine as the dealers Minimum Sales Responsibility, to provide and maintain adequate facilities, tools and equipment to service Dodge motor vehicles; to maintain a salesroom, service, parts and accessories facilities relatively equivalent to principal competitors, to use only Dodge or Mopar parts in servicing vehicles; to maintain the net worth and networking capital necessary to successfully discharge the dealer's undertaking, and to purchase vehicles, parts and accessories from Dodge at the price established by Dodge. The Agreement also contains the following provision:

> "This agreement does not create the relation of principal and agent between Dodge and Direct Dealer, and under no circumstances is either party to be considered the agent of the other" [8]

III.

Chrysler seems to rely upon this disclaimer of agency provision to absolve it from all responsibility for acts or actions by Plaza Dodge. We digress a moment to set this issue at rest.

CERCLA is broadly designed to assess costs and responsibility for remedying harmful conditions upon those responsible for problems caused by disposal of hazardous substances. Cf., *United States v. Northeastern Pharmaceutical & Chem Co*, 810 F.2d 726 [25 ERC 1385] (8th Cir. 1986), cert. den., 484 U.S 848 [26 ERC 1856] (1987); *United States v Aceto Agr Chems. Corp.*, 872 F.2d 1373 [29 ERC 1529] (8th Cir. 1989), reh'g. den. (1989); *Dedham Water Co. v Cumberland Farms Dairy, Inc.*, 805 F 2d 1074 (1st Cir 1986). A person cannot insulate himself from CERCLA liability by contract. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269 [34 ERC 1274] (Mich 1991); also see, *United States v Aceto Agr Chems. Corp.*, supra. Title 42 U.S.C §9607(e)(1) provides, in part, that:

> "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from . . any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section . . . "

The parties to an agreement are free to characterize their relationship in any way they choose, but, in establishing CERCLA liability, a court must look beyond that characterization and ascertain its true nature. Cf., *United States v. Aceto Agr Chems Corp.*, supra; *Florida Power & Light Co v Allis Chalmers Corp.*, 893 F.2d 1313 [31 ERC 1134] (11th Cir. 1990), *United States v Conservation Chem.*, 619 F.Supp 162 [24 ERC 1008] (Mo. 1985); *United States v. Wade*, 577 F.Supp 1326, 1333 n. 3 [20 ERC 1277] (Pa. 1983). The provision at hand is similar to a hold harmless agreement in that it insulates Chrysler from liability for all acts of Plaza Dodge, but if facts establish that Plaza Dodge was either an actual or an ostensible agent of Chrysler, when it performed acts upon

[7] Chrysler Motors Corporation was later merged into Chrysler Corporation, and in the Direct Dealer Agreement is referred to as Dodge

[8] The initial Direct Dealer Agreement and the Dealer Agreement Terms and Provisions were superceded and replaced by subsequent agreements This Court discerns no material differences between the initial agreement and subsequent agreements, and no purpose is served by detailing mere chronology.

which CERCLA liability is predicated, the provision will not serve to absolve Chrysler from CERCLA liability. The contention to the contrary by Chrysler is, therefore, set aside. Cf., *A M Int'l., Inc v. International Forging Equipment*, 743 F.Supp 525 [31 ERC 1659] (Ohio 1990), aff'd in part, rev. in part, _____ F.2d _____, 1993 WL 1290 [35 ERC 1977] (6th Cir 1993) It is apt to observe, however, that Plaza Dodge does not seek to impose derivative liability arising from an agent-principal relationship upon Chrysler, for acts of Plaza Dodge, as agent; but, instead, to pierce the corporate veil and impose direct liability on Chrysler for its own acts.

IV.

Uncontested facts disclose that, pursuant to the various contracts, during relevant times, the day-to-day operation of Plaza Dodge was conducted by Plaza Dodge employees under supervision of George Constance, but, that Chrysler maintained a directive voice, and through "persistent persuasion" effected some management aspects of the operation. For a time at least, the Chrysler Regional Manager submitted monthly reports on the Plaza Dodge operation to the Manager of the Business Management Department These reports reflected the Regional Manager's opinion of the operation, of the operator, of revenue generated through sales, related the operator's intention to infuse capital into the business, related suggestions made to Constance for purchase of additional stock in the corporation, evaluated the desirability of retaining Constance as a retailer, and matters of that nature In the course of these evaluations, the Regional Manager recommended that changes be made in the manner in which the business was being operated, e g , that the manager delegate greater authority to other employees, that an assistant to finalize sales be employed, that a customer relations program be instituted, that salesmen be required to file daily work plans, that salesmen be reassigned, that unproductive salesmen be terminated, that daily sales meetings be held, that windows and showroom be redecorated or festooned with balloons, pennants and banners, that the used car display be moved to an outside lot, that lights, banners and signs be erected or installed on that lot, that the feasibility of purchasing used automobiles from a certain auto auction to maintain a balanced inventory be investigated, that the service manager be discharged, that service mailings, promotions and clinics be increased, that an incentive plan for mechanics be instituted, that advertising be increased and a new format adopted. Most of these recommendations were implemented by Constance.

In addition, in 1971, and in 1974, Chrysler performed maintenance inspections of the Plaza Dodge facility, noted certain deficiencies in interior and exterior housekeeping and maintenance, directed Plaza Dodge to take corrective action, and obligated Constance to indicate, in writing, a completion date for repair on each of the items noted These actions by Chrysler were based upon a provision of the lease, which is virtually standard in commercial leases, inserted to prevent wasting or deterioration of the real property during the term of the lease. Because the actions were intended to enforce the terms of the landlord-tenant relationship, they must be viewed in that context, and not as invasions of the subsidiary's independence by the parent corporation.

V.

Chrysler contends that it did not, through its employees, participate in any way in the decision on disposition of waste oil generated by the Plaza Dodge Service Department, that the decision was solely that of Plaza Dodge, and that nexus necessary to establish liability of Chrysler as a generator is lacking. Plaza Dodge has produced no evidence tending to show that a Chrysler employee participated in the waste oil disposal decision, but contends that generator liability should be imposed directly upon Chrysler because Chrysler was actively involved and exercised pervasive control over the Plaza Dodge operation; for a time as sole or majority shareholder and, until 1974, as owner of all voting stock.

Dissected to its essential elements, Title 42 U S.C. §9607(a)(3) imposes liability as a generator upon

> "Any person who . . . arranged for disposal or treatment, . of hazardous substances . . . at any facility . . . containing such hazardous substances "[9]

[9] Among other things, a facility is defined as any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located

The word "arranged" is cryptically vague and undefined, but the statute is designed to assess costs and responsibility for remedying harmful conditions on those responsible for problems caused by disposal of hazardous substances, and, to achieve this end, courts have adopted a very liberal interpretation of the word "arranged" See, *United States v Northeastern Pharmaceutical & Chem Co.*, 810 F.2d 726, 733 (8th Cir 1986), cert. den , 484 U S 848 (1987); *United States v. Aceto Agri Chems Corp* , 872 F.2d 1373 (8th Cir. 1989), reh'g den., (1989), *Dedham Water Co v Cumberland Farms Dairy, Inc* , 805 F 2d 1074, 1081 (1st Cir. 1986). A person cannot insulate himself from liability by contract, and courts will look beyond the party's characterization of the transaction to ascertain its true nature and will impose liability accordingly See, e.g , *United States v Aceto Agr. Chems Corp* , supra; *Florida Power & Light Co v Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir 1990), *United States v Conservation Chem Co* , 619 F.Supp. 162, 192 (Mo 1985), *State of Missouri v Independent Petrochemical Corp* , 610 F.Supp. 4 [22 ERC 1167] (Mo 1985), *United States v Wade*, 577 F Supp. 1326, 1333 n 3 (Pa 1983). The sweep of the statute is very broad, but this does not mean that it has no finite limits. See, *Onan Corp v Industrial Steel Corp* , 770 F.Supp 490, 494 [32 ERC 1897] (Minn 1989), aff'd., 909 F 2d 511 [32 ERC 1902] (8th Cir 1990), cert den., ——— U.S. ———, 111 S Ct 431 [32 ERC 2037] (1990), *Edward Hines Lumber Co v Vulcan Materials Co* , 861 F.2d 155 [28 ERC 1457] (7th Cir 1988) Liability under CERCLA attaches only to persons who transact in hazardous substances with purpose or intent to dispose of or treat the substances, *Edward Hines Lumber Co v Vulcan Materials Co* , 685 F Supp. 651 [27 ERC 1904] (Ill 1988), aff'd., 861 F.2d 155 (7th Cir 1988), and ends with the person who made, or should have made, the decision on disposition. *Jersey City Redevelopment Auth. v PPG Industries*, 655 F.Supp. 1257, 1260 (NJ 1987), aff'd., 866 F 2d 1411 [28 ERC 1873] (3d Cir. 1988). Liability as a generator of hazardous substances, therefore, will not extend to a person whose actions, or inaction in face of a duty to act, do not demonstrate some responsibility for the decision on disposition of the hazardous substance. Cf., *United States v. Aceto Agr Chems Corp* , supra; *Florida Power & Light Co v Allis Chalmers Corp* , supra; *CPC Int'l. Inc v Aerojet-General Corp.*, 731 F.Supp. 783 [30 ERC 1752] (Mich. 1989); *Edward Hines Lumber Co. v. Vulcan Materials Co* , supra; *United States v A & F Materials Co., Inc.*, 582 F.Supp. 842 [20 ERC 1957] (Ill. 1984). This connection with the predicative act is referred to as nexus, and tests whether or not the party assumed, or had the obligation to assume, responsibility for the decision on disposal of the waste product. Cf., *United States v Northeastern Pharmaceutical & Chem Co.*, supra at 743; *CPC Int'l., Inc v Aerojet-General Corp* , 759 F.Supp 1269, 1278 (Mich. 1991).

The necessary nexus is easily found in instances where the party took affirmative action which resulted in deposit or treatment at a site which ultimately resulted in release of the hazardous substance, *United States v Consolidated Rail Corp* , 729 F.Supp. 1461, 1472 [31 ERC 1060] (Del. 1990), or retained the authority to control the handling and disposition of a hazardous substance and, by failing to act, in effect, decided upon the disposition by negative personal involvement. Cf , *Northeastern Pharmaceutical & Chem Co* , supra at 743; *Allied Towing Corp. v Great Eastern Petroleum Corp.*, 642 F.Supp. 1339, 1350 (Va 1986); *United States v A & F Materials Co., Inc.*, supra at 845 However, the mere ability or opportunity to control or influence a third-party's disposal of hazardous waste does not, in and of itself, constitute nexus CERCLA embodies traditional notions of duty and obligation as a predicate to imposing liability as a generator In instances where a party possesses ability to control or influence the disposition of a hazardous waste and does nothing, nexus can exist only if inaction violates a duty or obligation to exercise that control. *General Elec. Co. v. AAMCO Transmission, Inc.*, 962 F.2d 281 [34 ERC 1766] (2d Cir. 1992). This is consistent with the statute's intent — to impose liability upon persons who assumed responsibility or were impressed with responsibility for disposal of the waste product Reading the numerous published cases clearly indicates that in each instance the court must engage in a fact specific inquiry to

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See, *Title 42 U S C 9601(9)* The Arrowhead site is a facility

determine whether or not the action of the party sought to be charged as a generator of a hazardous substance provides the necessary nexus between that party's conduct and the disposal of hazardous waste [10] In this instance, nexus can be established only by a showing that acts of Plaza Dodge pertaining to waste oil disposition were actually acts of Chrysler, the parent corporation.

VI.

As a fundamental proposition of corporate law, a parent corporation is not automatically liable for acts of a subsidiary, in absence of specific statutory directive *Josylyn Mfg. Co. v. T. L. James & Co , Inc* , 893 F.2d 80 [30 ERC 1929] (5th Cir 1990), cert. den., _____ U.S. _____, 111 S Ct. 1017 [32 ERC 2053] (1991); *Jacksonville Elec. Auth. v. Eppinger & Russell Co.*, 776 F.Supp. 1542 [34 ERC 1845] (Fla. 1991). CERCLA does not include parent corporation in the definition of "person" upon whom liability may be imposed, and congressional intent to adopt a significant deviation from a traditional concept of corporate law should not be implied. Cf., *Midlantic Nat'l Bank v New Jersey Dept. of Envt'l. Protection*, 474 U.S. 494 [23 ERC 1913] (1986). Respondent's position, at bottom, is that the corporate formalities which created separate legal entities should be disregarded, the corporate veil pierced, and liability be imposed upon Chrysler for its own acts, not derivatively for acts of its subsidiary.

Counsel has cited no case, and this Court has unearthed none, which pierced the corporate veil to impose generator liability on a parent corporation. We can, however, work through analogy to cases in which the corporate veil was pierced to impose operator liability on a parent corporation.[11] In determining whether or not the corporate veil should be pierced, federal law controls, and our analysis must be directed by the pertinent body of federal common law which has been recently developed. Cf., *Anderson v Abbott*, 321 U.S. 349 (1944), reh'g den., 321 U.S. 804 (1944); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105 (9th Cir. 1979); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395 (D.C. Cir. 1988); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F.Supp. 345 [32 ERC 1837] (N.J. 1991); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 [29 ERC 1851] (Pa 1989); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F.Supp. 22 [26 ERC 2088] (Mass. 1987). In practice, generally, an actual participation and an exercise of control standard is utilized Cf., *Riverside Market Development Corp v. International Business Products, Inc* , 931 F.2d 327 (5th Cir 1991), cert. den., 112 S.Ct. 636 (1991); *New York v. Shore Realty Corp* , 759 F.2d 1032 [22 ERC 1625] (2d Cir. 1985); *United States v. Consolidated Rail Corp.*, 729 F.Supp. 1461 (Del. 1990); *United States v Conversation Chem Co* , 619 F Supp 162 (Mo 1985) [3] The mere authority to control a subsidiary corporation's activity without the actual exercise of that control will not satisfy that standard [4] See, *Levin Metals Corp v*

[10] A court should not be misled by cases which indicate that ownership or possession of the waste product is necessary to liability as a generator. See, e.g., *State of New York v City of Johnstown, NY*, 701 F.Supp. 33 [29 ERC 1018] (NY 1988); *C. Greene Equip. Corp v Electron Corp.*, 697 F.Supp. 983 (Ill. 1988), *United States v. Ward*, 618 F.Supp. 884 (NC 1985) The narrow limitation of generator liability to an owner or possessor of the waste product seems contrary to the language of the statute, cannot be reconciled with cases which emphasize the decisionmaking process as critical, and has been rejected by the Eighth Circuit. See, *United States v. Aceto Agr. Chems. Corp* , 872 F.2d 1373 (8th Cir. 1989), reh'g. den (1989); also see, *United States v Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. den., 484 U.S. 848 (1987).

[11] Operator is rather circularly defined in CERCLA as any person who operates a facility *Title 42 U.S.C 9601(20)(A)(ii)* A workable definition seems to be that a person is an operator of a facility if he actively participates in the wrongful conduct prohibited by CERCLA. Cf., *Riverside Mkt Dev Corp v. International Building Products, Inc* , 931 F 2d 327, 330 [33 ERC 1209] (5th Cir 1991), cert. den., 112 S.Ct. 636 [39 ERC 1312] (1991)

[12] Title 42 U.S.C. §9601(20(A)(iii) seems to adopt an actual control test in defining liability in the owner-operator context which clearly indicates that Congress could have, but did not, adopt a control test to impose generator liability upon a parent corporation

[13] Dicta in *United States v Kayser-Roth Corp , Inc* , 910 F.2d 24, 27 n 8 (1st Cir 1990), cert den., _____ U.S _____, 111 S.Ct. 957 (1991), implying that parent corporation liability can be predicated upon nothing more than the ability to control hazardous

Parr-Richmond Terminal, 781 F.Supp. 1454 [35 ERC 1718] (Cal. 1991). The corporate veil will be pierced, therefore, and liability will be visited upon the parent corporation, only when the parent dominates the subsidiary to the extent the subsidiary manifests no separate corporate interests, but exists and functions solely to advance purposes of the parent corporation, cf., *Josylyn Manufacturing Co. v T L James & Co.*, 893 F.2d 80 (5th Cir 1990), cert. den , ——— U.S. ———, 111 S Ct 1017 (1991), *Krivo Industrial Supply Co v National Distillers & Chem. Corp.*, 483 F 2d 1098 (5th Cir. 1973), and the subsidiary exists as a sham to perpetuate fraud, promote illegality, inflict injustice or solely to avoid individual or parent corporation liability. See, *United States v Jon-T Chems , Inc.*, 768 F.2d 686 (5th Cir. 1985), cert. den., 475 U.S. 1014 (1986), *American Bell, Inc. v Federation of Telephone Workers of Pennsylvania*, 736 F 2d 879 (3d Cir 1984); *Publicker Industries v Roman Ceramics*, 603 F.2d 1065 (3d Cir. 1979). Some courts have grafted a second prong to the standard, and will impose liability upon a parent corporation only when the parent actually participated in the wrongful conduct prohibited by CERCLA.[14] See, *Riverside Mkt Dev Corp v International Building Products, Inc* , supra; *United States v Kayser-Roth Corp , Inc* , 910 F.2d 24 [31 ERC 1932] (1st Cir. 1990), cert. den., 111 S Ct 957 [32 ERC 2053] (1991), affirming, 724 F.Supp. 15 [30 ERC 1932] (R I 1989), *New York v Shore Realty Co.*, 759 F.2d 1032 (2d Cir. 1985); also cf , *United States v Northeastern Pharmaceutical & Chem Co.*, 579 F.Supp 823 [20 ERC 1401] (Mo 1984), rev'd. in pt. o/grounds and aff'd. in pt., 810 F.2d 726 (8th Cir 1986), cert den., 484 U.S 848 (1987) If this refinement of the standard is adopted, we need proceed no further There is no evidence, whatsoever, which indicates that Chrysler participated in the decision on disposal of waste oil. This court, however, finds that this embellishment of the active participation standard is overly restrictive, and prefers the broader scope of the standard which contemplates active participation and control of the subsidiary's operation, in toto.

A veritable laundry list of factors worthy of consideration in reaching a determination of whether or not to pierce the corporate veil has been developed. These factors include:

a. whether or not parent and subsidiary have common stock ownership,
b. whether or not parent and subsidiary have common directors and officers,
c. whether or not parent and subsidiary have a common business office,
d whether or not financial statements and tax returns are consolidated,
e. whether or not the parent finances the subsidiary,
f. whether or not the parent caused the incorporation of the subsidiary,
g. whether or not the subsidiary operates with grossly insufficient capital,
h. whether or not the parent pays salaries and expenses of the subsidiary,
i. whether or not the subsidiary receives no business from anyone other than the parent,
j. whether or not the parent uses the subsidiary's property as its own,
k whether or not the daily operation of the corporations are kept separate,
l. whether or not the subsidiary observes basic corporate formalities.

Cf., *Jacksonville Elec Auth. v Eppinger & Russell Co.*, 776 F.Supp. 1542 (Fla. 1991); *Mobay Corp v. Allied-Signal, Inc.*, 761 F.Supp. 345 (N.J. 1991); *United States v Kayser-Roth Corp.*, 724 F.Supp 15 (R.I. 1989), aff'd., 910 F 2d 24 (1st Cir 1990), cert. den., 111 S.Ct 957 (1991).

Of course, this enumeration is not exclusive, and any factors which, when evaluated in light of the circumstances, bear upon the degree of control exercised and the actual participation or involvement in the subsidiary's affairs by the parent should be considered. Cf., *Mobay Corp v. Allied-Signal, Inc.*, supra.[15]

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waste contradicts the holding, and should be disregarded See, *Jacksonville Elec Auth v Eppinger & Russell Co* , 776 F.Supp 1542, 1547 n 4 (Fla 1991)

[14] A similar standard is utilized in determining a secured creditor's liability as owner of a facility Cf , *United States v Fleet Factors Corp* , 901 F 2d 1550 [31 ERC 1465] (11th Cir 1990), reh'g den , 911 F.2d 742 (11th Cir 1990), cert den , 111 S.Ct 752 [32 ERC 1977] (1991)

[15] Indicia of ability to control decisions concerning hazardous waste is indicative of the type of control necessary to pierce the corporate veil, but it may be that this is not essential if other indicia demonstrate pervasive control. See, *United States v Kayser-Roth*, supra.

When the specific factors to which other courts have referred, and similar factors are considered, uncolored by circumstances, we discern some factors which lend support to movant's position. Chrysler initially incorporated and financed Plaza Dodge, Inc. as a subsidiary, and Chrysler retained an ownership interest until its investment was recouped, maintained a critical eye on the business operation, suggested changes in the operation, and maintained employees as Directors and officers of Plaza Dodge during the time that it owned any of the capital stock. On the other hand, balancing factors are that Plaza Dodge observed basic formalities of a separate corporate entity, transacted the day-to-day business through its own employees, established pay and benefits for its own employees, and maintained its own books, paid its own taxes, expenses and salaries. Chrysler and Plaza Dodge did not have common Directors or officers, did not utilize one business recordkeeping department, did not consolidate financial statements, file consolidated tax returns or combine daily operations Chrysler was in the business of manufacturing automobiles and had a natural interest in aiding in the development of retail outlets. Plaza Dodge was in the business of selling automobiles at retail and had a natural interest in a profitable operation. The corporations acted to promote these interests which are related, but separate.

When the relationship between Chrysler and Plaza Dodge is viewed in its entirety, in light of all circumstances, Chrysler's position was akin to that of a creditor. The initial incorporation and financing, maintaining employees on the Board and as officers, and retaining ownership of capital stock were almost naturally attendant to the relationship. The management guidance proffered by Chrysler was contemplated by the Dodge Direct Dealer Agreement Terms and Provisions and was directed towards protecting Chrysler's investment and developing a profitable enterprise to the end that Plaza Dodge would sell more Chrysler products and generate funds so that Constance would be enabled to purchase all of the capital stock, and own the business outright. Each corporation had a goal which combined to form a mutual goal. The intercession by Chrysler to aid in reaching that mutual goal fell far short of an interference with the day-to-day operation of Plaza Dodge or emasculation of its independent corporate function. The uncontested material facts, with all reasonable inferences drawn in Plaza Dodge's favor, do not demonstrate actual participation and exercise of pervasive control by Chrysler to the extent that one is persuaded that Plaza Dodge was a sham without separate corporate interests, or was organized and operated solely to advance Chrysler's interests, to perpetuate fraud, promote illegality or simply to shield Chrysler from liability. No genuine issue of material fact exists, and the facts established, together with reasonable inferences, do not justify piercing the corporate veil. If the corporate veil is not rent, nothing impressed Chrysler with a duty to assure proper disposition of waste oil removed from automobiles serviced in the Plaza Dodge shop. The necessary nexus upon which to predicate independent generator liability upon Chrysler is lacking.

WHEREFORE, It is —

RECOMMENDED.

That the motion for an order granting summary judgment for Chrysler Corporation be granted, and the Clerk of the Court be directed to enter judgment accordingly.

ARKANSAS PEACE CENTER v. ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

U.S. Court of Appeals
Eighth Circuit

ARKANSAS PEACE CENTER, ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS, JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND, VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER, and MOTHERS AIR WATCH, Plaintiffs-Appellees, v ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WILLIAM K.

REILLY, ADMINISTRATOR; Defendants, VERTAC SITE CONTRACTORS; Defendant-Appellant; ARKANSAS ATTORNEY GENERAL, Defendant, Nos 93-1447/1516/1518, April 2, 1993

Resource Conservation and Recovery Act

Burning of hazardous waste — In general (▸155.4001)

Enforcement — Citizen suits — In general (▸155.8020.01)

Judicial procedure and review — Remedies/settlements (▸155.9030)

[1] Federal appeals court will stay preliminary injunction issued in Resource Conservation and Recovery Act citizen suit to prevent incineration of dioxin-containing wastes by federal and state environmental agencies, because. (1) agencies showed likelihood of succeeding on merits of their claims at trial, (2) there is risk of irreparable harm to public interest if stay is not granted, and (3) stay will not cause substantial harm to citizens groups where agencies continue to monitor incinerator emissions.

On motions for stay of preliminary injunction issued by federal district court (DC EArk, No. LR-C-92-684, Reasoner, J.) to prevent incineration of dioxin-containing wastes by federal and state agencies after citizen groups brought suit under Resource Conservation and Recovery Act, motions granted

Daniel J. Dunn, Edward J. McGrath, and Colin G. Harris, Denver, Colo., and Jim L. Julian and Janie W. McFarlin, Little Rock, Ark., for appellant Vertac Site Contractors.

David C. Shilton, John A Bryson, Ronald Spritzer, and Alice Mattice, Dept. of Justice, and Lawrence E. Starfield and Dawn M. Messier, EPA, Wash., D.C., for appellant EPA.

Mick G. Harrison, Richard E. Condit, Wash., D.C., and Gregory Ferguson, Little Rock, Ark., for appellees Arkansas Peace Center, et al.

Before Theodore McMillian, John R. Gibson, and Roger L. Wollman, circuit judges.

Full Text of Opinion

McMILLIAN, Circuit Judge

Defendants Environmental Protection Agency (EPA); the Arkansas Department of Pollution Control and Ecology (ADPCE) and Vertac Site Contractors (Vertac) move this court to continue a temporary stay pending appeal of a preliminary injunction entered at the request of plaintiffs Arkansas Peace Center, Environmental Health Association of Arkansas, Jacksonville Mothers' & Children's Defense Fund, Vietnam Veterans of America Arkansas State Chapter, and Mothers Air Watch shutting down a hazardous waste incinerator located at the Vertac site near Jacksonville, Arkansas. *Arkansas Peace Center v Arkansas Department of Pollution Control & Ecology*, No. LR-C-92-684 (E.D. Ark Mar 17, 1993). For the reasons discussed below, we dismiss the interlocutory appeals (Nos. 93-1447, 93-1516, 93-1518) of the amended TRO as moot, treat the motions to continue the stay as motions for stay pending appeal, and grant the motions for stay pending appeal of the preliminary injunction.

Some background is necessary to understand the procedural posture of these appeals. On October 28, 1992, plaintiffs filed an action against defendants in federal district court to stop the incineration of hazardous wastes contaminated with dioxin at the Vertac site in Jacksonville, Arkansas. Plaintiffs alleged the incineration was proceeding in violation of certain federal and state regulations concerning incinerator performance and that incineration would pose an imminent and substantial endangerment to public health and the environment. Plaintiffs sought declaratory and injunctive relief to stop the incineration and to require EPA and ADPCE to prepare a remedial investigation and feasibility study to determine treatment and disposal options other than incineration for the hazardous wastes stored at the Vertac site. On October 30, 1992, the district court granted in part plaintiffs' request for a TRO. The district court did not enjoin incineration of the so-called D-Waste (hazardous waste contaminated with extremely low level concentrations of dioxin, less than 12 parts per billion) but did enjoin incineration of the so-called T-Waste (hazardous waste contaminated with low level concentrations of dioxin, less than 50 parts per million), except for 5 days of a previously schedule "trial burn" of T-Waste, pending further proceedings.

On January 5, 1993, the district court ordered the parties to submit briefs on

credibility of a police officer's testimony regarding the existence of probable cause to make a traffic stop. While, under *Whren*, "Operation Pipeline" is not itself illegal, judges should be mindful of the potential affect a request to make a "pipeline" stop may have on a police officer's observations of an automobile.[8]

The holding in *Whren* underscores the difficulty in balancing the societal interests of combating crime though effective law enforcement and upholding the rule of law, including adhering to constitutional rights. Judges must take care to insure that the legal interest takes precedence. As Justice Frankfurter said:

> Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conductive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more that a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.

On Lee v. United States, 343 U.S. 747, 758–59, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (Frankfurter, J., dissenting).

SO ORDERED.

CENTERIOR SERVICE COMPANY, et al., Plaintiffs,

v.

ACME SCRAP IRON & METAL, et al., Defendants. and cases consolidated therewith

No. 1:94 CV 1588.

United States District Court,
N.D. Ohio,
Eastern Division.

May 1, 2000.

Potentially responsible parties (PRPs) who were required by government to clean up hazardous waste disposal site under Comprehensive Environmental Response, Compensation and Liability Act (CERC-

8. It is also notable that *Akram* and *Hill* were "profiling" cases, in which the police, unlike here, had no prior information that the occupants may be involved in illegal activity A "profiling" case involves a traffic stop where the vehicle and/or its occupants fit a so called "drug courier profile" or are "target" vehicles Judges should be even more wary of a "pipeline stop" in a "profiling" and/or "target" automobile case, as was the case in *United States v Freeman*, 209 F 3d 464 (6th Cir 2000) The defendants in *Freeman* were driving a motor home along a highway and were stopped for crossing the white line The police then obtained consent to search the automobile and discovered drugs Defendants moved to suppress The district court denied the motion The Sixth Circuit reversed, finding the police lacked probable to make the traffic stop The Sixth Circuit also gave the following warning to law enforcement "they are not to abuse the authority provided to them under *Whren* and *Ferguson* Although illegal narcotics have a widespread and devastating effect on our country, the answer in controlling drug use does not lie in sacrificing our precious Fourth Amendment constitutional guarantees " *Id* at 471 (Clay, J , concurring)

The analysis in *Freeman* illustrates the only relevant inquiry in the wake of *Whren* The issue is no longer one of pretext, but rather of whether probable cause existed for the traffic stop, and whether police testimony on this issue is credible

LA) sought contribution from other PRPs. On remand, 153 F.3d 344, two defendants moved for summary judgment. The District Court, Gaughan, J., held that defendants were not liable as arrangers absent admissible evidence that they owned or controlled service stations which had sent material to site.

Motions granted.

1. **Health and Environment ⇐25.5(5.5)**

To establish a prima facie case for cost recovery under CERCLA, plaintiff must prove: (1) site is "facility"; (2) release or threatened release of hazardous substance has occurred; (3) release has caused plaintiff to incur necessary costs of response; and (4) defendant falls within one of four statutory categories of potentially responsible parties. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. § 9607(a).

2. **Federal Civil Procedure ⇐2544**

Summary judgment opponent's burden of setting forth specific facts showing that there is genuine issue for trial is not satisfied by pointing to absence of evidence supporting summary judgment motion. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. **Health and Environment ⇐25.5(5.5)**

Oil company was not liable, as arranger, for cost of cleaning up hazardous waste disposal site under CERCLA, absent evidence company had owned or operated gasoline service stations which had arranged for disposal of waste oil at site; only admissible evidence was that stations were either independently owned or leased to independent dealers. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. § 9607(a).

4. **Federal Civil Procedure ⇐2544**

While summary judgment opponent is not obligated to cite specific page numbers, he must point out location of designated portions of record with enough specificity that district court can readily identify facts upon which he relies. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.

5. **Federal Civil Procedure ⇐2544**

In summary judgment proceeding, moving party need not disprove elements of plaintiffs' claim nor submit affirmative evidence that no factual dispute exists but, rather, need only point to absence of genuine issue of material fact. Fed.Rules Civ. Proc.Rule 56, 28 U.S.C.A.

6. **Health and Environment ⇐25.5(5.5)**

Oil company was not liable, as arranger, for cost of cleaning up hazardous waste disposal site under CERCLA, absent evidence company's plant had ever sent any material to site; unauthenticated notes of investigator's interview were insufficient to create fact issue, where interviewed witnesses' deposition testimony denied ever having picked up material from company's plant. Comprehensive Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. § 9607(a).

7. **Health and Environment ⇐25.5(5.5)**

Oil company did not own plant which sent material to hazardous waste disposal site, and thus was not liable, as arranger, for cost of cleaning up site under CERCLA; company records indicated that it had not owned plant at relevant time, and unauthenticated document in which plant was referred to as being owned by company would not be considered. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. § 9607(a).

Thomas M. Downs, Swidler Berlin Shereff Friedman, Washington, DC, for plaintiff.

Carter E. Strang, Arter & Hadden, Cleveland, for defendant Atlantic Richfield.

Mary M. Bittence, Baker & Hostetler, Cleveland, for defendant Shell Oil.

Memorandum of Opinion and Order

GAUGHAN, District Judge.

Introduction

This matter is before the Court upon defendant Atlantic Richfield Company's Motion for Summary Judgment (Doc. 1177) and defendant Shell Oil Company's Motion for Summary Judgment (Doc. 1232). This is a CERCLA[1] action, filed by plaintiffs against numerous defendants arising out of costs incurred in the cleaning of a hazardous waste disposal site following the issuance of a unilateral Administrative Order to plaintiffs by the United States Environmental Protection Agency (EPA) pursuant to § 106(a) of CERCLA. These defendants seek summary judgment on the basis that they are not liable as "arrangers." For the following reasons, both Motions are GRANTED.

Facts

On interlocutory appeal of this case the Sixth Circuit found the facts in this case to be undisputed:

> From approximately 1938 until 1990, the Huth Oil Services Company operated a waste oil reclamation facility at the Huth Oil Site. The site was owned by plaintiff Ashland Oil Incorporated from 1964 until 1981, [FN1] when Huth Oil purchased the property from Ashland. The site contained approximately 33 oil storage tanks with a 992,000 gallon storage capacity. Numerous companies deposited waste oil at the site during its more than 40 years of operation.
>
> FN1. Prior to 1964, Huth Oil leased the property from the Columbia Refining Company.
>
> Between 1983 and 1989, the United States Environmental Protection Agency ('EPA') and the Ohio Environmental Protection Agency inspected the site, and on several occasions found that the storage tanks and saturated soils at the site were contaminated with hazardous substances, mainly poly chlorinated biphenyls. The EPA also noted that the site was in a dilapidated condition, that its oil tanks were corroded, and that unauthorized access to the site was possible through gaps in the fence surrounding it. Subsequently, after an investigation, the EPA identified four [potentially responsible parties, hereafter PRPs] that played a hand in the poor conditions of the site: (1) Ashland Oil, the current owner/operator of the site; (2) Huth Oil, a previous owner; (3) Cleveland Electric Illuminating Co.; [FN2] and (4) plaintiff General Electric Company. The EPA found that the latter two parties had each arranged for disposal of hazardous substances at the site.
>
> FN2. Plaintiff Centerior Service Company is the parent corporation for the Cleveland Electric Illuminating Company.
>
> On October 5, 1990, based on the above findings, the EPA issued a unilateral Administrative Order to the plaintiffs [Centerior Service Co., General Electric Co. and Ashland Oil Inc.] under CERCLA § 106, which required the plaintiffs to undertake and complete an emergency cleanup of the site .. To this end, the plaintiffs assert that they incurred approximately $9.5 million in costs relating to the cleanup required by the § 106 order... After beginning the cleanup efforts, the plaintiffs conducted their own investigation to identify other potentially responsible parties for the site contamination. The plaintiffs identified approximately 250 parties that had arranged for the disposal of waste oil and other hazardous substances at the site. At no point, however, did the plaintiffs contest their status as PRPs, assert de-

1. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675

> fenses to liability under § 107(a), or seek reimbursement for their response costs from the government under CERCLA § 106(b)...
>
> [On August 4, 1994], the plaintiffs filed five one-count claims for relief against more than 125 defendants seeking to recover their cleanup costs from these parties under § 107(a) of CERCLA, and asserting that the defendants were jointly and severally liable for the costs. . On August 5, 1995, the cases were consolidated for the purposes of discovery and pre-trial proceedings. .

Centerior Service Company v. Acme Scrap Iron & Metal, et al., 153 F.3d 344, 345–347 (6th Cir.1998).

Defendants Shell Oil Company and Atlantic Richfield Company have now moved for summary judgment arguing that they are not liable for having arranged for disposal.

Standard of Review

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (citing Fed.R.Civ.P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir.1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323, 106 S.Ct. 2548 (citing Fed.R.Civ.P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir.1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir.1985). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir.1995) (quoting *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249–50, 106 S.Ct. 2505 (citation omitted).

Discussion

The Sixth Circuit stated:

> CERCLA is the primary statutory means by which harmful or potentially harmful hazardous waste disposal sites are remediated. The statute grants the EPA broad enforcement powers and options. For example, the EPA may on its own initiate response actions to clean up a hazardous waste site using monies from the Hazardous Substances Superfund. and then recover its response costs from PRPs [potentially responsible parties]. It may also require the private PRPs to themselves undertake response actions..
>
> Once a site has been cleaned up, CERCLA provides two causes of action for parties to recover the response costs incurred by the cleanup effort: joint and several cost recovery actions governed exclusively by § 107(a), *see* 42 U.S.C. § 9607(a), and contribution actions as set forth in § 113(f). *See id.* § 9613(f)(1) .

Centerior Service Company, 153 F.3d at 347.

[1] Parties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of defendants. *Id.* As such, "to establish a prima facie case for cost recovery under § 107(a), a plaintiff must prove four elements: (1) the site is a 'facility'; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur 'necessary costs of response'; and (4) the defendant falls within one of the four categories of PRPs." *Id.* (citations omitted), *Kalamazoo River Study Group v. Rockwell International Corp.*, 171 F.3d 1065 (6th Cir.1999).

There are four categories of PRPs: (1) the current owner or operator of a waste facility; (2) any previous owner or operator during any time in which hazardous substances were disposed at a waste facility; (3) any person who arranged for disposal or treatment of hazardous substances at the waste facility; and (4) any person who transported hazardous substances to a waste facility. *See* § 107(a)(1)-(4) and *Centerior Service Company, supra.*

Defendants herein allegedly arranged for disposal or treatment of hazardous substances at the waste facility. The relevant CERCLA provision states:

> Notwithstanding any other provision or rule of law, and subject only to defenses set forth in subsection (b) of this section-
>
> .
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,. shall be liable

42 U.S.C. § 9607(a). In *United States v Cello-Foil Products, Inc*, 100 F.3d 1227 (6th Cir.1996), the Sixth Circuit stated:

> CERCLA does not define the phrase 'arrange for.' .. We conclude that the requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances. The intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances.
>
> * * * * * *
>
> Therefore, in the absence of a contract or agreement, a court must look to the totality of the circumstances, including any 'affirmative acts to dispose,' to determine whether the defendants intended to enter into an arrangement for disposal.

See also Carter-Jones Lumber v. Dixie Distributing, 166 F.3d 840 (6th Cir.1999) (citing the same).

(1) Atlantic Richfield (ARCO)

Defendant Atlantic Richfield Company (hereafter, ARCO) argues that it did not own the service stations identified by plaintiff as having arranged for the disposal of waste oil at the Site or that it leased them to independent dealers and, in either case, it did not control the day-to-day activities of the stations.

ARCO names seven ARCO brand service stations which it asserts plaintiff has identified as stations which have arranged for the disposal of waste oil. ARCO submits two affidavits of Robert Fidler, its district sales manager, who avers that the named stations were leased to independent contractors or independently owned at the time alleged waste oil pick ups were made. (ARCO Exs. 1 and 6). ARCO asserts that lessors are not liable for the lessee's waste disposal activities under CERCLA. *General Electric Company v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2nd Cir.1992) ("oil companies [are] not 'arrangers' of disposal of their services station tenants' waste oil and, therefore, [are] not liable on that basis.")

Plaintiffs do not dispute that an oil company is not liable as an arranger under CERCLA for wastes generated by an independent dealer but assert that facilities other than the ones named by ARCO in its Motion were not addressed by ARCO. Plaintiffs identify several facilities which it states ARCO has not denied owning or operating. Additionally, plaintiffs assert that ARCO fails to identify the entities that did operate or control the facilities during the relevant times which ARCO denies owning. Furthermore, plaintiffs assert that Fidler's affidavit fails to state that ARCO never operated any of the subject facilities during the time the Huth site operated as a disposal facility (i.e., 1938 to 1990) and/or that it never sent waste to the Site. Plaintiffs assert, "Absent from ARCO's Motion is sworn testimony that neither ARCO nor any of its predecessors. ever operated or otherwise controlled any of the ARCO stations identified in the case, or any other facility from which waste was sent to the Huth Site during its years of operation [1938–1990]." (brief at 8).

Plaintiffs argue that it has sought through interrogatories and document requests information regarding whether and for what time period ARCO operated or controlled any facility from which waste was or may have been disposed of at the Site and identification of the entities that did operate or control the ARCO facilities during the relevant periods. Plaintiffs argue that ARCO's Motion for Summary Judgment should be denied until plaintiffs have an opportunity to obtain this discovery. Plaintiffs assert that their discovery requests have been outstanding for three years and that despite the extension of time to September 20, 1999 within which ARCO was to respond, ARCO has not served its responses.

For the following reasons, ARCO's Motion is granted.

[2, 3] First, it is plaintiffs' burden "to set forth specific facts showing that there is a genuine issue for trial." *Anderson, supra.* Plaintiffs' burden is not satisfied by pointing to an absence of evidence supporting defendant's Motion. Thus, while plaintiffs contend that ARCO does not submit *affirmative evidence* that it did not operate the facilities which ARCO states were independently owned, such a contention does not defeat summary judgment where ARCO has submitted affidavit evidence that these facilities were independently operated. Second, on November 24, 1999, ARCO filed its Addendum to Reply in support of its Motion for Summary Judgment stating that it had served its responses to plaintiffs' discovery (interrogatories and requests for production). It does not appear from the docket that plaintiffs have filed any further response. Therefore, plaintiffs may not rest on their assertion that ARCO has failed to comply with discovery. Third, for the following reasons, the Court agrees with ARCO that

plaintiffs' evidence fails to create an issue of fact.

Plaintiffs assert that ARCO "fails to address facilities about which plaintiffs have obtained evidence regarding the sale of waste to Huth." (brief at 5). Plaintiffs list three facilities.

First, plaintiffs name "Swanson Bros. ARCO . for which plaintiffs presently have at least one pick up ticket.[2]" (*Id.*). In support, plaintiffs point to "Bates No. ACTN. 00352." Included with various documents submitted as plaintiffs' Ex. D is a document bearing this number. The document is a copy of a receipt dated 1983 from Action Oil Company naming "Swanson Bros. ARCO" and stating "150 gal. @ .23 $34.50." Plaintiffs do not identify any affidavit or deposition testimony which incorporates this receipt. Therefore, the Court does not find it to be sufficient evidence to show that Swanson Bros. arranged for the disposal of waste oil at the Site.

Second, plaintiffs name "Turney ARCO," pointing to "Bates No. 2149." A review of the various papers attached with plaintiffs' Exhibit D fails to reveal a document containing this number.

Third, plaintiffs name

> Facilities referred to in the Consent Decree, App. F, 'Laskin Non De Minimus and De Minimis Settlors,' *U.S. v. Alvin Laskin*, [1989 WL 140230] Northern District of Ohio, Eastern District, Case No. C–84–2035Y, [Feb. 27, 1989] September 20, 1989, including the following facilities whose waste oil was transshipped to the Huth Site: ARCO. . , ARCO Erie. . , ARCO Station . , Church's ARCO . . and Sal's ARCO.

(brief at 5–6). Plaintiffs do not explain what *U.S. v. Alvin Laskin* is or its relevance herein. Nor do plaintiffs attach a copy of the consent decree but refer the court to what appears to be a computer database which the Court was unable to access with the information provided. In this regard, plaintiffs also refer the Court to "statements of Alvin Laskin, dated November 18, 1999, that 'my largest customer for used waste oil was Huth Oil Company' (Bates No. 1635)." However, a review of the various papers attached with plaintiffs' Exhibit D fails to reveal a document containing this number or any Laskin statements.

Therefore, plaintiff's assertion that ARCO fails to address its relationship to these other facilities fails to create an issue of fact.

[4] Finally, in plaintiffs' *conclusion* paragraph, they merely state that summary judgment is not warranted, "Given the circumstances of this case, including the site nexus deposition testimony and documentary evidence collected to date by plaintiffs that implicate, if not establish, ARCO's liability (*See* attached Exhibit D) " (brief at 8). Aside from failing to explain what the "site nexus deposition testimony and documentary evidence collected to date" is, plaintiffs do not attempt to identify any specific testimony or documentation submitted in the collection of materials labeled as Exhibit D. Of course, "A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989). While the nonmoving party is not obligated to cite specific page numbers, he should "point out the location of. . the designated portions of the record [which] must be presented with enough specificity that the district court can readily identify facts upon which the nonmoving party relies " *Id* Plaintiffs herein make no attempt to identify what portions of Exhibit D create an issue of fact. Never-

2. Although not clarified by plaintiffs, "pick up ticket" apparently signifies that the service station arranged to have waste oil picked up by Huth for purposes of disposing of it

theless, as ARCO responds to this evidence, the Court will address it.

Plaintiffs submit portions of "interview reports" of former Huth Oil employees who purportedly told the interviewers information regarding waste oil. ARCO objects to the statements as improper Rule 56 evidence. Indeed, they are incomplete reports and not verified in any way. Plaintiffs fail to demonstrate that the statements are incorporated by way of affidavit or deposition. Thus, they have not been considered.

Plaintiffs also submit portions of various deposition transcripts (with no mention of who the deponents are in relation to this lawsuit). In the portion of the deposition of Lucille Gravina submitted [3], the deponent was told that she would be given names of companies and asked whether she recalled any business relationship with Huth. When ARCO was mentioned, she testified, "That sounds familiar to me." She was asked, "Familiar in what way?" She responded, "For picking up waste products." In reply, ARCO points to other portions of her testimony wherein she had no real basis for her recollection but states, "I just remember George Huth picking up waste product possibly from there." (ARCO Ex. C). This type of possibility is not sufficient to create an issue of fact for trial.

In the portion of the deposition of Joyce Nichols [4] submitted by plaintiffs, Nichols was asked to identify from a document listing names of companies which ones were waste oil customers of Huth Oil. She affirmatively identifies, among others, "Turney Oak Arco." Plaintiffs do not attempt to explain or identify this document or point to evidence as to whether Turney Oak was operated by ARCO. In reply, ARCO points out that the document also references a "Cobbledick Buick" (depo. at 39). ARCO presents evidence that this entity did not come into existence until 1976. (ARCO Ex. F). ARCO then presents affidavit testimony that Turney Oak has been independently operated since 1974. Therefore, this Court agrees with ARCO that plaintiffs have not shown that as of the date of the document, when Turney Oak was allegedly a waste oil customer of Huth Oil, that ARCO operated this station.

Finally, plaintiffs submit portions of deposition testimony of Carl Starr and Kurt Tenerove, who ARCO identifies as former waste oil drivers for Huth and Action Oil. Starr testifies that he picked up waste oil from ARCO gas stations. He could not identify the stations. As ARCO points out, Starr testifies that he did not know whether the stations were operated by ARCO or independently operated. (ARCO Ex. G at 75–76). Tenerove also testifies that he had no knowledge as to whether the ARCO stations were independently operated: "I don't know whether they're company or independent." (depo. at 218). Thus, the drivers' testimony fails to create an issue of fact that ARCO owned or operated stations which arranged for disposal of waste oil at the Site.

For these reasons, plaintiffs' proffered evidence fails to create an issue of fact. Therefore, ARCO's Motion for Summary Judgment is granted as plaintiffs have failed to demonstrate that there is an issue for trial as to whether ARCO arranged for the disposal of waste oil at the Site.

(2) Shell Oil

Shell Oil (hereafter, Shell) argues that it cannot be held liable for arranging for disposal of waste oil at the Site. As explained in more detail below, Shell argues that the service stations identified by plaintiffs as having generated waste oil were operated by independent dealers and not Shell, there is no evidence that Shell ever contracted or otherwise arranged for wastes to be transported to and disposed

3. ARCO states in its reply brief that Gravina was a bookkeeper for Huth Oil.

4. She was apparently another former Huth Oil bookkeeper

at the Site from the West Third Street Facility identified by plaintiffs and it never owned the Oil City Facility identified by plaintiffs and, therefore, did not arrange for wastes to be transported from that facility and disposed at the Site.

(a) the service stations

Shell asserts, as did ARCO, that the Second Circuit and one district court have concluded that oil companies are not liable as arrangers for wastes generated by a service station of an independent dealer which leased the station from the oil company. *General Electric Company v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2nd Cir.1992) and *United States v. Arrowhead Refining Co.*, 829 F.Supp. 1078 (D.Minn.1992). As such, Shell contends that independent dealers controlled the operations of the Shell brand service stations identified by plaintiffs as generating the waste oil. Shell asserts that plaintiffs have identified these stations located in Cleveland, Elyria, Lorain, Mansfield, Akron, Dayton, Canton and New Philadelphia during the time period of 1951 to 1962. Shell submits the affidavit of Anthony Nolte who avers, "Based on my knowledge and review of available records regarding stations located in these cities during this time frame, only dealer-operated stations were identified." (Shell Ex. 1). Shell asserts that this is supported by the deposition testimony of Todd McClead, a driver for Action Oil, one of the plaintiffs herein, and William Miller, a driver for Huth Oil. McClead testified, "All the Shell stations that were service stations back then were all independent around here." (Ex. 6 at 96). Miller testified that the Shell stations were "dealer-owned" rather than "company stations." (Ex. 7 at 88). Nolte avers, "Dealers. are independent businessmen and businesswomen who own and control their own operations and facilities, including the ownership and control of the generation, management, transport, and disposal of the waste oil from their facilities." (Nolte aff.) Accordingly, Shell contends that no evidence exists to show that it assumed, or had the authority or obligation to assume responsibility, for the waste oil generated by the independent dealers.

Plaintiffs contend there are disputed facts on this issue as evidenced by the contradictions in Shell's own affidavits. Plaintiffs assert that despite Nolte's averment that only dealer-operated stations were at the cities named during the years 1951 to 1962, the affidavits offered by Shell of James Burkett and Thomas Stepp concede that a Dayton, Ohio Shell station was operated by Shell during this time frame and that Shell conducted and controlled the motor oil change operations there. Plaintiffs assert that these affiants fail to state where the waste oil from this facility was disposed.

In its reply, Shell points out that Burkett avers that plaintiffs did not identify this station as being at issue in this case.

James Burkett is Shell's "Manager–Salary Stations, Head Office." [5] Burkett avers that with the exception of three " 'conventional' salary stations" Shell has not conducted oil change operations at its salary service stations. One of these salary stations which had the ability to conduct oil changes is located in Dayton, Ohio at the intersection of Far Hills and Stroop. He avers that plaintiffs have not identified these three conventional salary stations as being at issue in this case. (Burkett aff.). Stepp, Shell's "Manager–Business Marketing–Jobber Business," also avers that none of the stations in Ohio generally between 1950 and 1970 have been conventional type company-owned/operated stations with the ability to change oil with the exception of the station in Dayton at the location identified by Burkett. (Stepp aff.).

Because plaintiffs fail to point to evidence contradicting this affidavit testimony that the Dayton station was not identified by plaintiffs as having arranged to dispose of its waste oil at the Site, they have not

5. Thomas Stepp defines "salary" as "company owned and operated " (Stepp aff)

demonstrated that there is a disputed issue of fact in this regard.

Additionally, plaintiffs argue that Shell's evidence "regarding independent dealers does not establish that others controlled *all* of the Shell stations and motor oil changing operations heretofore implicated in the case by several witnesses and documents." (brief at 2). Plaintiffs refer the Court to their Exhibit A attached to the brief, "*See* nexus information attached hereto as Exhibit A." (*Id.* at footnote 2). However, Exhibit A is largely a collection of unsworn and unathenticated documents consisting of a "signed statement" of Carl Stutzman who refused to sign the statement, an incomplete document entitled, "Estimated Volumes–Laskin Oil," a Huth Oil document listing names of companies for oil pick up and "waste crank case oil," portions of interview reports, copies of ledgers, Action Oil driver logs and Action Oil receipts. Exhibit A also contains portions of deposition transcripts. Because plaintiffs fail to identify which of this evidence, even if admissible, or what portions of the depositions show that Shell owned or operated some of the stations, plaintiffs do not satisfy their burden.

[5] Plaintiffs also argue that "certain other Shell facilities named and implicated by evidence collected to date have *not* been addressed by Shell." However, plaintiffs do not point to affirmative evidence identifying other facilities. In a summary judgment proceeding, the moving party need not disprove the elements of plaintiffs' claim nor submit affirmative evidence that no factual dispute exists but, rather, need only point to an absence of a genuine issue of material fact. *Celotex, supra.*

Furthermore, plaintiffs assert that Shell has failed to respond to outstanding interrogatories and document requests propounded over three years ago (i.e., in October 1996) requesting information regarding whether and for what time period Shell operated or controlled any facility in Ohio from which waste was or may have been disposed of at the Site. Plaintiffs contend that on August 4, 1999, pursuant to the Case Management Order, it served Shell with a Notice of Outstanding Discovery Requests which stated that the responses must be served within 45 days (pltfs.Ex. B) and that no responses have been served. Shell replies that since 1995 it has provided plaintiffs with sworn affidavits and relevant case law showing that it is not liable for the Site. In this regard, Shell submits the affidavit of its attorney, Mary Bittence, who incorporates two 1995 letters to plaintiffs' attorney wherein Bittence states that after researching Shell's involvement, she concluded that material taken to the Site was from independent dealers over which Shell is not responsible and that the evidence submitted to Shell from plaintiffs did not implicate Shell. Also attached is a third 1995 letter enclosing Rule 26 voluntary disclosures. (Shell reply Ex. 1). Finally, a November 1998 letter from Bittence to plaintiffs' attorney attaches affidavits and a summary of deposition testimony purportedly demonstrating that Shell is not liable for waste at the Site.

It does not appear that after having served their notice on Shell (amongst numerous other defendants), and having received no response, plaintiffs have filed a motion to compel this allegedly outstanding discovery. Thus, this contention will not defeat summary judgment.

Finally, plaintiffs argue that in *General Electric, supra,* wherein the Second Circuit determined that an oil company is not liable for the oil waste shipments of its independent dealers, the court examined the lease agreements between the dealers and the oil companies before determining that the oil companies did not contract responsibility for waste disposal of the dealers. Plaintiffs assert that herein Shell has not provided plaintiffs with copies of the applicable leases. Again, Shell asserts that it is not its obligation to disprove the elements of plaintiffs' claim. Nevertheless, in its reply Shell submits the affidavit

of Linda Paul, who is employed by an agency as Supervisor of Contracts and who conducted a review for records of Shell's leases with its independent dealers in Ohio for 1938 to 1990. Paul avers that no records for leases were found before 1974 but she incorporates with her affidavit a copy of a model service station lease used by Shell from 1974 to 1990 for its independent dealers. All the leases she reviewed contained the same or similar paragraph stating that Shell does not reserve the right to control the operations or business of the lessee. (reply Ex. 2). Shell points out that the language of their leases contained nearly identical language to those in *General Electric*. *Id.* at 283. Therefore, plaintiffs' assertion in this regard lacks merit.

For these reasons, plaintiffs have failed to raise an issue of fact as to the liability for the service stations' disposal of waste.

(b) the West Third Street Facility

[6] Next, Shell argues that there is no evidence that it ever contracted or otherwise arranged for wastes to be transported to and disposed at the Site from the West Third Street Facility identified by plaintiffs. Shell submits the affidavit of R.H. Safranek, Terminal Manager of the plant located at West Third Street in Cleveland, who avers, "No information or documentation was found which would indicate that [Shell's] Distribution Plant on West Third Street in Cleveland, Ohio ever sent any material to Huth Oil Company." (Shell Ex. 4). Shell also asserts that none of the plaintiffs testified that they had any knowledge of waste oil being transported from this facility and disposed at the Site. Shell points to Gordon Stutzman's [6] testimony that he had no recollection of business relationships between the facility and Huth. (Shell Ex. 9 and 10). Another driver for Huth Oil, John Ockenga, also testified that he did not recall any business between Huth and this facility. (Shell Ex. 8).

Plaintiffs point to portions of an "interview report" of John Ockenga wherein he apparently [7] states that Shell did blending of oils at West 3rd, that waste material picked up "came from off-spec production at West 3rd and oil changes at the gas stations" and there "was contaminated diesel oil and off-spec blends at West 3rd and crank case oil at the gas stations." (pltfs.Ex. A). Plaintiffs also point to the unsigned statement of Carl Stutzman that another driver picked up oil from Shell. (*Id.* at 1034). The Court agrees with Shell that the unauthenticated notes of the investigator's interview do not create an issue of fact. Moreover, Shell points again to Ockenga's deposition testimony that he did not recall any business with this facility. (Shell Ex. 8). And, while Stutzman's unsigned statement expresses that he picked up oil from Shell, his deposition testimony specifically states that he did not recall any pick ups of waste oil by Huth from the West Third Street facility and that he did not recall Huth having received any "off-spec oil" from that facility. (Shell Ex. 10).

Therefore, plaintiffs fail to show that the West Third Street Facility arranged for disposal of waste at the Site.

(c) the Oil City Facility

[7] Finally, Shell contends that it never owned a bulk plant facility in Oil City, Pennsylvania despite plaintiff's allegation that Shell owned this facility and arranged for waste oil from it to be ultimately transported to the Site. Shell submits the affidavit of Robert Dunphy, a Real Estate Consultant for Shell, who avers that he conducted a review of the records and concluded that Shell never owned a bulk plant facility in Oil City, Pennsylvania. (Shell Ex. 5).

6. Stutzman was apparently a driver for plaintiffs

7. It appears that the "interview report" *paraphrases* the interviewee's answers to certain topics posed (pltfs Ex A at 6777)

Plaintiffs point to what it characterizes as "an apparent EPA document" (brief at 9) entitled "Estimated VolumesLaskin Oil [8] " wherein another document is headed "Shell Oil–Oil City Pennsylvania" and states, "Laskin picked up about 2,000 gallons twice a year from 1973–80 from the bulk plant facility." (pltfs. Ex. A at 1646, 2025). Of course, Shell objects to the consideration of such an unauthenticated document. The Court agrees.

Conclusion

For the foregoing reasons, defendant Atlantic Richfield Company's Motion for Summary Judgment and defendant Shell Oil Company's Motion for Summary Judgment are granted.

IT IS SO ORDERED.

GENCORP, INC., Plaintiff,

v.

AIU INSURANCE COMPANY, et al., Defendants.

No. 5:95CV2464.

United States District Court, N.D. Ohio, Eastern Division.

June 2, 2000.

Insured brought declaratory judgment action against liability and excess insurers, seeking defense costs and/or indemnification for losses resulting from environmental suits. The District Court, Dowd, J., 970 F.Supp. 1253, granted summary judgment for excess insurers, affirmed 178 F.3d 804. On insured's motion for partial summary judgment on issue of trigger of coverage, the Court held that: (1) continuous trigger analysis was appropriate, to extent insured could show continuous damage to property, but injury-in-fact rather than exposure would be used as initial triggering event, and (2) "manifestation theory" was inapplicable in context of slow release of toxins and clear damage prior to manifestation.

Order accordingly.

1. Insurance ⇐1832(1)

Under Ohio law, language in insurance contract that is reasonably susceptible of more than one meaning is construed liberally in favor of insured.

2. Insurance ⇐2265

Under Ohio law as predicted by federal district court, continuous trigger analysis would be used to determine occurrence-based liability insurance policies' coverage of environmental contamination actions against insured, to extent insured could show that property damage was continuous; however, injury-in-fact rather than exposure would be initial triggering event, since point of initial injury was provable and use of exposure as triggering event would conflict with policies' distinction between event causing injury and injury itself.

3. Insurance ⇐2265

Under Ohio law as predicted by federal district court, "manifestation theory" was inapplicable to identify trigger for occurrence-based liability insurance policies' coverage of environmental contamination actions against insured, where contamination comprised slow release of toxic substances and contaminated site was clearly damaged prior to manifestation; instead, continuous trigger analysis applied to extent insured could show continuous damage to site.

8. Plaintiffs state that Laksin is a supplier of waste oil to Huth.